

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	

**COMMENTS OF
THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES
CBEYOND COMMUNICATIONS, LLC
DSLNET COMMUNICATIONS, LLC
EL PASO NETWORKS, LLC
FOCAL COMMUNICATIONS CORPORATION
NEW EDGE NETWORK, INC.
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comments in response to the Commission's above-captioned notice of proposed rulemaking initiating a Triennial Review of unbundled network elements ("UNEs").¹

I. INTRODUCTION AND SUMMARY

This *Triennial Review* is one of several proceedings initiated to establish policy and rules governing "broadband" services and facilities.² The Commission announced in the subsequently released *Broadband NPRM* that promotion of the ubiquitous availability of broadband to all Americans is now the Commission's primary goal.³ Commenters are concerned that the Commission in this proceeding will erroneously and unlawfully reduce or eliminate ILEC unbundling obligations in the misguided view that this would promote its goal of provision of broadband services to all Americans.

In fact, reduction or elimination of ILEC unbundling obligations would not promote provision of broadband services. ILECs under current requirements have already deployed facilities that provide a broadband capability to most customers, and ILECs and the competitive segment of the industry are continuing to take steps that could eventually lead to ubiquitous very high capacity broadband networks. To the extent ILECs have recently slowed investment this is due to the diminished threat of competition from CLECs and the recent recession. Indeed, it is the threat of competition, not immunity from regulation, that best encourages ILECs to build

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket No. 01-338, FCC 01-361, released December 20, 2001 ("*NPRM*").

² *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, released December 20, 2001 ("*NonDom NPRM*"); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 02-42, released February 15, 2002 ("*Broadband NPRM*").

³ *Broadband NPRM* at ¶ 3.

broadband networks. To the extent more advanced broadband networks are not being deployed quickly enough, which is not the case, the explanation is simple – consumers are not willing to pay for them because the additional services that could be provided over them, such as video programming, are readily and more affordably available by other means.

Moreover, ILEC implied promises that they will build advanced broadband networks if relieved of unbundling obligations are no more than the latest manifestation of their traditional attempt to manipulate policy makers by promising to provide desired services if they are permitted to retain their monopoly. The Commission should reject this promise if for no other reason than that ILECs have a long record of making false promises in exchange for regulatory relief which they subsequently fail to fulfill. For example, ILECs promised policy makers that they would build very high capacity common carrier broadband networks if permitted to provide video programming. Congress granted that request in the 1996 Act. ILECs' failed to deliver on that promise and now demand additional regulatory relief, including the radical request that broadband networks be excluded from common carrier regulation entirely. If this request were granted, ILECs would not fulfill their current promises to build advanced broadband networks, absent permission to cross-subsidize and raise consumer rates, because very advanced broadband networks are not now economically viable. As explained in these comments, the Commission's goal of the ubiquitous availability of broadband networks, beyond what is already available, is most likely to be achieved by a thorough-going and vigorous implementation of the pro-competitive provisions of the Act.

As a matter of competitive necessity, CLECs must fully participate in the further development of broadband services and networks. CLECs cannot realistically compete as

competitive telecommunications carriers if they are limited, by whatever reason, to provision of existing broadband services. The Commission should affirm in this proceeding that future ILEC high-capacity network elements used to provide broadband services will be fully subject to Section 251(c) unbundling obligations, if the statutory unbundling test is met, in order to assure that competitive goals of the 1996 Act are achieved.

In any event, narrowing or eliminating unbundling obligations in the misguided view that this would help achieve broadband goals would be unlawful. There is no rational basis for the Commission to reach a conclusion that reduction of unbundling obligations would promote broadband. Therefore, it would be arbitrary and capricious for the Commission to reduce unbundling obligations on that basis. It would also be arbitrary and capricious for the Commission to reduce unbundling obligations in order to promote the goals of Section 706 of the 1996 Act because the Commission has itself determined on three occasions that “an advanced telecommunications capability” is being provided to all Americans on a reasonable and timely basis.

Further, the Commission is required to interpret its statutory mandate, if possible, in ways that give a consistent meaning to each statutory provision. In interpreting its statutory mandate, the Commission is required to assume that Congress did not intend to adopt contradictory and conflicting provisions. Thus, Congress did not view the statutory goal of provision of an advanced telecommunications capability to all Americans as conflicting with ILEC unbundling obligations. Instead, Congress envisioned that the goals of section 706 of the 1996 Act would be achieved by unbundling and the other pro-competitive provisions of the Act. Based on recent separate statements and speeches of the current Chairman and some Commissioners, it may be

their opinion that unbundling is incompatible with the goals of Section 706. However, it would be unlawful for the Commission to attempt to implement this view under the current Act since, under a seamless and consistent interpretation of the Act, Congress has mandated that advanced services goals be achieved in part through utilization of unbundling and the other pro-competitive provisions of the Act. The Commission may not interpret Section 706 as authorizing the evisceration or weakening of any of pro-competitive provisions of the Commission's statutory mandate.

Instead, the Commission must permit unbundled access to an incumbent network element if an application of the statutory "necessary" and "impair" tests is met. The Commission's interpretation of those tests in the *UNE Remand Order* provides for a satisfactory and lawful implementation of ILEC unbundling obligations under Section 251(c)(3). There is no reason for the Commission to change those interpretations now. The Commission may not under the "at a minimum" language of Section 251(c)(3) restrict unbundling obligations in order to promote broadband networks for the reasons discussed above. Nor, for the same reasons, may the Commission establish a more granular approach to implementation of unbundling in order to promote broadband networks. However, a more granular unbundling approach would be permissible under the Act as long as this is a more refined implementation of the statutory "necessary" and "impair" tests.

With respect to particular UNEs, the Commission should be guided by the overall undeniable reality that not much has changed since the Commission's review of UNEs in the *UNE Remand Order*, except that the string of liquidations and bankruptcies of competitive providers, and the depression in the competitive telecom sector, has decreased the availability of

alternatives to ILEC facilities. For the most part, the Commission should reestablish all existing UNEs more or less on the same terms and conditions. The Commission must maintain provision of new EELs as a condition of the current, or any expanded, switching carve-out.

The Commission must compel ILECs to provision and convert EELs for CLECs and must lift the prohibition on commingling. ILECs have exploited these restrictions to thwart EEL conversions.

There is no basis for reducing unbundling obligations for high capacity loops and transport. There was never any basis for a conclusion that independent providers had sufficiently constructed alternatives to ILEC high capacity loops and transport. The recent pullbacks and bankruptcies of independent fiber providers that ILECs previously cited as hard evidence of the availability of alternatives to ILEC facilities only makes more obvious the fact that there are no realistic alternatives to ILEC high capacity loops and transport.

The Commission's examination in this and other proceedings of whether the Commission should eliminate or curtail unbundled access to incumbent broadband network elements, safeguards against discrimination governing BOCs participation in the information services marketplace, and/or common carrier regulation of incumbent broadband networks has created regulatory uncertainty. Commenters request that the Commission conclude these proceedings at the earliest possible date.

II. UNBUNDLING IS NOT A BARRIER TO INFRASTRUCTURE INVESTMENT OR BROADBAND DEPLOYMENT

A. ILECs Are Already Rapidly Deploying Broadband Capability

The *NPRM* requests comment on whether unbundling obligations deter ILEC investment in broadband infrastructure.⁴ The simple and obvious answer is no. ILECs have already widely deployed a broadband capability, and are rapidly installing an even more robust broadband capability in their existing networks. For example, only 9 months ago, in June 2001, Verizon informed the New York Public Service Commission that the “unprecedented and unpredictable demand” for high-speed data circuits required increased capital spending and the deployment of new technologies.⁵ In 2000, Verizon’s capital spending for special access services was nearly 4 *times* the amount spent just 3 years earlier. In 1999, SBC launched “Project Pronto,” a \$6 billion investment in high-speed broadband services to residential consumers. SBC and other ILECs have proclaimed that DSL and other advanced services were “strategic growth driver[s].” In a January 24, 2002, “Investor Briefing” SBC announced that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the “industry’s largest DSL Internet customer base.”⁶ SBC’s public pronouncements regarding data services provided to enterprise customers were equally glowing. SBC announced growth in its data services of between 14.4% and 27.9% in

⁴ *NPRM* at ¶¶ 23-24.

⁵ See, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Cases 00-C-2051 and 92-C-0665, Opinion No. 01-1, NYPSC, June 15, 2001, p. 10.

⁶ SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings/1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) (“SBC Fourth Quarter Briefing”).

2001 and 16.9% in the fourth quarter of 2001 for high-speed data transport services.⁷ For its part, BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001, which BellSouth noted was “the fastest growth of any DSL or cable provider in the country.”⁸ BellSouth claimed that it had “the most aggressive DSL deployment strategy in the industry” and that it had increased its DSL coverage from 45% to 70% of households in 2001.⁹ This rollout has been particularly successful in Georgia, where BellSouth is deploying DSL throughout rural communities in part because of state tax credits for infrastructure investment.¹⁰ Moreover, BellSouth has admitted that DSL is profitable.¹¹

Obviously, these ILECs have deployed, and are continuing to deploy, these broadband facilities, including fiber in the loop, in spite of outstanding statutory unbundling obligations, and the Commission’s determination in 1998 that advanced networks were fully subject to Section 251(c)(3) unbundling obligations.¹² Therefore, regardless of pronouncements from ILECs’

⁷SBC Second Quarter Briefing, at 4; SBC Third Quarter Briefing, at 4; SBC Fourth Quarter Briefing, at 4.

⁸ BellSouth investor news, “BellSouth Reports Fourth Quarter Earnings,” http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (Jan. 22, 2002).

⁹ *Id.* Qwest, while lagging behind the other ILECs, nevertheless had impressive growth as well. In January 2002, Qwest announced that DSL customers increased by 74% and revenues from DSL services by 66% in 2001. “Qwest Communications Reports Fourth Quarter, Year-End 2001 Results,” http://media.corporate-ir.net/media_files/NYS/Q/q_1_28_02earnrel.htm (Jan. 29, 2002).

¹⁰ BellSouth Announces Expanded Market Launch of High-Speed DSL Service in Rural Georgia, March 6, 2001, <http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=35542>. For a description of Georgia tax incentives see Economic Development Financing Packet, Georgia Department of Community Affairs, October 2000, pp 21-25.

¹¹ See Comm. Daily, Vol. 22, Issue 7, 2002 WL 5240363, Jan. 10, 2002 (quoting statement of BellSouth Chairman, Duane Ackerman); see also *Hearing on H.R. 1542, The Internet Freedom and Broadband Deployment Act of 2001 Before the Senate Commerce, Science and Transportation Comm.*, 107th Cong. (2002) (Statement of Sen. Earnest F. Hollings, Chairman of the Senate Commerce, Science and Transportation Comm.).

¹² *Deployment of Wireline Service Offering Advanced Telecommunication Capability*, 13 FCC Rcd 24011 (1998). For a time, SBC and Verizon provided advanced services through affiliates that the Commission had

regulatory spokespersons and lobbyists, their actions reveal that unbundling obligations have not inhibited their investment in broadband infrastructure.¹³

B. Competition Is The Best Incentive For Infrastructure Investment For All Industry Players

The threat of competition provides the best incentive for ILECs to invest in broadband networks. ILECs' pattern of deployment of DSL capable networks perfectly illustrates that fact. In a nutshell, ILECs ignored DSL until CLECs began to deploy it. As President Clinton's Council of Economic Advisers stated in early 1999:

Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.¹⁴

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.¹⁵ That decision is unsurprising and perhaps even economically rational from the ILECs' point of view, but consumers and businesses were

determined were presumptively nondominant. However, the cited network investments were made by the parent companies.

¹³ The ILECs also were able to compete effectively for DSL and other data customers. Verizon, for example, reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001. "Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002," http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002). Verizon also announced that it had deployed DSL to central offices serving 79% of Verizon's local access lines and that its total number of data circuits in service had increased 53% from 2000. News Release, "Verizon Communications Second Quarter Earnings Highlighted by Strong Long-Distance and Wireless Sales," <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=59168> (July 31, 2001).

¹⁴ ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, pp. 187-188, <http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf>)

¹⁵ James Glassman, "Best Remedy for Recession? Break Up the Bells," <http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131> (December 10, 2001).

required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services, such as ISDN. Competition from CLECs thus was pivotal in furthering investment by ILECs that would permit provision of DSL and other advanced services.

Moreover, it is not coincidental that after two of the "big three" CLEC DSL providers terminated operations and the third filed for bankruptcy, some ILECs announced they were scaling back DSL investment somewhat – although even this maneuver did not prevent them from achieving the record-breaking growth discussed above, so that they now control 90% of DSL customers.¹⁶ For example, in October 2001, SBC scaled back its original deployment plan for Project Pronto and reduced capital spending by 20% in 2002.¹⁷ Recent comments to the Commission in other proceedings have demonstrated a virtual lockstep correlation between the diminished threat of competition to ILECs and decreased investment.¹⁸ Thus, in the four years from 1997-2000, the BOCs invested \$100 billion, 22% more than during the four years prior to passage of the 1996 Act.¹⁹ In contrast, BOCs have somewhat moderated their pace of investment in the period following the collapse of financial markets' support to CLECs in 2000 that diminished the threat of competition from CLECs.²⁰

In short, to the extent any diagnosis other than the general recession is needed to explain these modest scalebacks, it is apparent that ILECs no longer feel the need to invest quite so

¹⁶ New York Times, August 6, 2001, at C1 "Bell Companies Blamed for D.S.L.'s Woes."

¹⁷ SBC Advanced Solutions, Inc., Tariff FCC No. 1, pp. 60-69 (eff. Sept. 10, 2001); SBC Second Quarter Briefing, at 5.

¹⁸ Comments of Cbeyond and Nuvox, CC Docket No. 01-337, at 13-15 (March 1, 2002).

¹⁹ *Id.* BOCs' increased investment post-1996 Act by itself refutes their contention that Section 251 unbundling obligations inhibit investment.

²⁰ *Id.* at 15, describing the level of BOC investment for 2000, 2001, and 2002.

rapidly in light of the diminished threat of competition from CLECs. It is also worth noting that some ILECs substantially raised prices for DSL service, which never would have happened in a competitive market. To name only one, in October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while admitting that its cost to provide DSL connectivity was declining).²¹

As a group of distinguished economists explained in a December 2001 letter to Commerce Secretary Donald Evans: “both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it has already in place by limiting its use and raising its price.”²² In a perfect illustration of this point, SBC reduced investment and raised prices as soon as the threat of broadband competition diminished. Thus, competition, not deregulation, is the best way to encourage ILECs to invest in broadband infrastructure.

C. Even If The Commission Changes Its View To Believe That Broadband Services Are Not Being Deployed Rapidly Enough, Factors Other Than Unbundling Obligations Fully Explain The Pace Of Deployment

The Commission recently concluded that the deployment of advanced telecommunications capability was occurring on a reasonable and timely basis.²³ Therefore,

²¹ SBC Investor Briefing, “Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management,” Growth Drivers (July 25, 2001) at 5 (“SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements.” http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002).)

²² Letter from William J. Baumol et al. to Honorable Donald L. Evans et al., dated December 11, 2001, at 3.

²³ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, rel. February 6, 2002, at ¶ 1.

there is no reason to find that removal of unbundling obligations, or other possible ill-advised steps under consideration in other proceedings, are necessary to promote deployment of advanced telecommunications capability. Nonetheless, to the extent that the Commission concludes that a more advanced broadband capability is not being deployed rapidly enough, it is clear that circumstances other than unbundling obligations fully explain the current pace of deployment.

First, there are no services for which wireline broadband networks more advanced than those already in place are necessary. Referred to as the lack of a “killer application,” there are simply no services not already available to consumers that would make broadband particularly desirable. Video programming is available from several sources including over-the-air broadcast, cable, satellite, videocassettes and DVDs. High speed web browsing is already available through DSL and cable modem service, although these services are not necessarily substitutes for each other. Businesses have been able for years to obtain the high-speed services they need from ILECs in the form of DS-1 and higher speed services. In short, futuristic ubiquitous wireline broadband networks have not been built because there is insufficient demand for them. A government policy that effectively requires construction of these networks would at this point do no more than produce a multibillion-dollar white elephant.

In a refreshing change from ILEC and other government views, it was recently reported that the Administration has recognized that demand, not supply, is limiting the growth of broadband networks (again, assuming that they are not being deployed fast enough, which is not

the case).²⁴ Thus, it was reported that Glenn Hubbard, Chairman of the President's Council of Economic Advisors stated at a recent industry meeting that:

"Many consumers don't yet see the value of broadband," he said, pointing to the fact that in Atlanta, [a] price point of zero still wasn't sufficient motivation for half of consumers. As far as Bush Administration is concerned, he said, policy decisions can have "bigger impact on the demand side ..."²⁵

Ubiquitous advanced broadband networks have also not been built because the technical solutions that might make them affordable have not yet been invented. Recent studies show that residential customers are unwilling to pay more than \$25.00/month for high speed access and that this explains why less than 5% of U.S. households subscribe to it.²⁶ The ILECs have dangled the prospect of a kind of super-broadband "passive optical network," bringing fiber optics as close to consumers as possible.²⁷ But given that the ILECs' own funded studies estimate that the cost of deploying such gold-plated networks nationwide would be \$270 billion to \$416 billion,²⁸ or even in the trillions,²⁹ it is clear that this type of network is not currently economically feasible by any stretch of the imagination.³⁰ Accordingly, even if the Commission were to comprehensively deregulate ILECs' participation in the broadband marketplace, there is

²⁴ "Bush Administration Focuses on Increasing Demand for Broadband," Comm. Daily, March 6, 2002, p. 3.

²⁵ *Id.*

²⁶ "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, <http://www.c.ec-planet.com/news/02feb2002/18broadband.html>

²⁷ Comm. Daily, February 26, 2002, at 4-5, describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, February 25, 2002.

²⁸ *Id.*

²⁹ *Proceed With Caution*, Telephony, April 1, 2002.

³⁰ As explained in Section V, F of these comments, TELRIC pricing permits ILECs to fully recover the cost of investment in broadband networks. Therefore, the primary reason that super-advanced broadband networks are

no reason to believe that this would result in widespread deployment of more advanced broadband networks, simply because the costs thereof are more than consumers are willing to pay. In fact, ILECs will not build these futuristic networks unless costs drop dramatically or they are permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases.

D. UNE-Based Competition Best Achieves the Goals of Section 706

Although only ILECs possess ubiquitous networks that can be used to provide services to consumers and businesses, they are not the best source of innovation in provision of services over those networks. In fact, ILECs are slow to roll out new services, and have strong incentives to not deploy, new, efficient services that will compete with, and cannibalize, existing services. Thus, making portions of the ILEC network available to other companies promotes provision of new services, and old services at lower prices.

In a perfect illustration of this point, innovative CLECs, such as Cbeyond, are able to purchase DS-1 loops and high capacity transport as UNEs and use them, combined with their own facilities to provide integrated voice and Internet access services for what the ILEC charges for the voice component alone.³¹ Based on past experience, BOCs will not use their own facilities in an equivalently efficient manner until they reach a cross-over point in which losses to competitors would exceed losses from cannibalizing their own services.

not yet constructed is that they cannot at this time be built for a price and consumers are willing to pay, not that ILECs would be prevented by UNE pricing rules to fully recover that cost and a reasonable profit.

³¹ Cbeyond's basic service package is 2000 minutes/month of long distance service, always-on Internet access, and 5 voice lines for less than \$600 per month.

In a further example, as noted previously, UNE-based CLECs pioneered the introduction of DSL services to residential and small business customers. In addition, CLECs, in contrast to ILECs, worked cooperatively with their ISP customers to serve their needs, who, in turn, have been a key in the development and deployment of new advanced services. ISPs have pioneered a myriad of advanced services, such as Internet telephony, unified messaging, and MP3 technology, that promise to revolutionize the telecommunications industry.

The *NPRM* fails to acknowledge that the availability of incumbent networks on an unbundled basis promotes innovation and the availability of advanced services. The Commission has consistently found that unbundling of ILEC facilities, such as in Open Network Architecture requirements, is the best way to promote innovation in use of the public network.³² Accordingly, the Commission should conclude that unbundling is the best way to achieve the goals of Section 706 of the 1996 Act.

³² See, *Amendment of Sections 64.702 of the Commission's Rules and Regulations, (Computer III)*, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (Phase I Order), reconsideration, 2 FCC Rcd 3035 (1987) (Phase I Reconsideration), further reconsideration, 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further reconsideration, 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated, *California v. FCC*, 905 F. 2d 1217 (9th Cir. 1990) (California I), on remand, *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon. 7 FCC Rcd 909 (1992), affirmed *California v. FCC*, 4 F. 3d 1505 (9th Cir. 1993) (California II); also on remand, *Computer III Remand Proceedings, Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rec. 7571 (1991), affirmed *California v. FCC*, 39 F. 3d 919 (9th Cir. 1994) (California III); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) (Phase II Order), reconsideration, 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), Phase II Order vacated *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (California I); *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1 (1988) (BOC ONA Order), reconsideration, 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order), amendment, 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order); *Erratum*, 5 FCC Rcd 4045 (1990), further amendment, 6 FCC Rcd 7646 (1991) (BOC ONA Further Amendment Order), reconsidered, 8 FCC Rcd 97 (1993) (BOC ONA Amendment Reconsideration Order), affirmed *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (California II). ONA is the overall design of a carrier's basic network service to permit all users of the basic network, including the enhanced server operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and equal access basis.

E. Unbundling Is Necessary For, and Promotes Facilities-Based Competition

Unbundling encourages, and makes it possible for, competitors to invest in broadband infrastructure. New entrants use UNEs as a market-entry strategy. The availability of UNEs allows competitors to enter markets without incurring the massive up-front capital expenditures of replicating the ILEC network. Unbundling permits competitors to invest in facilities gradually and where it is economically feasible to do so. Conversely, unbundled access to ILEC network elements avoids a wasteful duplication of facilities to the extent that the local telecommunications marketplace determines over time that some portions of ILEC networks may not be realistically or efficiently duplicated. Thus, eliminating unbundling obligations for broadband facilities would thwart, not promote, facilities-based competition because this would preclude entry by competitors except through non-facilities based strategies.

Unbundling also does not discourage CLECs from using alternative networks. Most competitors, including Commenters, use facilities obtained from other competitive providers where they are available, and would gladly increase their use of such facilities. Given the numerous difficulties in dealing with the ILECs, no competitors use ILEC facilities as a first choice if reasonable alternatives are available.

Commenters cannot stress strongly enough that the three-alternative market entry strategies established in the Act – self-provisioning, unbundled access, and resale – permits the marketplace to decide when and where it is economically viable to construct new facilities. The Commission should be extremely cautious in substituting its own judgment as to when and whether competitors should be building broadband facilities. An error by the Commission would make facilities-based competition infeasible in light of the huge up front costs. It is also worth

pointing out that the statutory “necessary” and “impair” tests appropriately define ILEC unbundling obligations in light of marketplace conditions. Where the marketplace has done its work and alternatives are available, ILECs are no longer required to offer unbundled access to network elements. The Commission should let the marketplace work under these statutory tests, and not impose its views on when and how competitors should invest in broadband facilities. The Commission can be assured that competitors have been rapidly constructing facilities. Since 1996, CLECs have invested more than \$56 billion in new facilities.³³

Closing off CLEC access to ILEC broadband facilities would also deny CLECs the benefit of sharing in the economies of scope and scale from which the ILECs derive a huge competitive advantage in their capacity as historical monopoly providers. The Commission in its *Local Competition Order* recognized that ILECs have “economies of density, connectivity, and scale” and required that these economies be shared with new entrants. Accordingly, the Commission found that efficient competition for local exchange services will be promoted by allowing new entrants “to enter local markets by obtaining use of the incumbent LECs’ facilities at prices that reflect the incumbents’ economies of scale and scope.”³⁴

The Commission emphasized in its *UNE Remand Order* that “one important purpose of the unbundling provisions of the Act is to permit competitive LECs to compete with the same economies as the incumbents, especially in the early stages of local competition, when their

³³ See State of Local Competition 2001, Association of Local Telecommunication Services.

³⁴ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶ 232 (1996) (subsequent history omitted) (“*Local Competition Order*” or “*Local Competition First Report and Order*”).

networks are limited in their reach, and their customer bases are necessarily small.”³⁵ The Commission recognized that the advantages of these economies were not “earned” by the ILECs, but rather were “obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies.”³⁶ The Commission reiterated that these “government-sanctioned advantages remain barriers to the requesting carriers’ ability to provide a range of services to a wide array of customers, and that their existence justifies placing a duty on the incumbent carriers to share their network facilities.”³⁷ Accordingly, for these same reasons, the Commission should ensure that CLECs have access to ILEC facilities capable of providing broadband services. Denying CLECs the benefits of scale and scope in this context could seriously harm competition, given that CLECs’ cost of capital is currently so much higher than the ILECs’.

F. ILECs’ Implicit Promises to Build Broadband Networks Should Be Evaluated in Light of Past Failures to Fulfill Promises and Unprecedented Violations of the Rules

If for no other reason, the Commission should reject ILEC implicit promises that they will build bigger and better broadband networks if relieved of unbundling obligations because the ILECs have a long record of attempting to manipulate policy makers with promises they fail to keep. ILECs have repeatedly made – and subsequently broken – the promises they have made to the Commission and state regulators in order to gain regulatory approval for mergers. For

³⁵ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, ¶ 86 (1999) (“*UNE Remand Order*”).

³⁶ *Id.*

³⁷ *Id.*

example, despite strong financial performance and a flexible regulatory framework in Pennsylvania, Verizon has failed to increase investment in its network in Pennsylvania as it promised.³⁸ Similarly, as a condition to its merger with Ameritech, SBC promised to provide vigorous local competition in 30 out-of-region major markets. Indeed, it was this promise that tipped the scale in favor of a finding that this otherwise unappealing mega-merger would be in the public interest. Recently, however, SBC has publicly disavowed any intention of meeting more than the minimal out-of-region requirements of the merger conditions and will undoubtedly abandon this effort as soon as the merger conditions expire.³⁹ Similarly, Verizon has recently requested that its investment in the now defunct Northpoint should be counted towards its commitment to engage in vigorous out-of-region competition.⁴⁰

Perhaps most on point, the BOCs for years promised that they would build broadband common carrier networks that would make it possible for consumers to receive a host of new services if only the Commission or Congress would remove the restrictions on their provision of video programming.⁴¹ Congress did so in the “Open Video” provisions of the 1996 Act.⁴²

³⁸ Economics and Technology, Inc., Broken Promises, A Review of Bell Atlantic-Pennsylvania’s Performance Under Chapter 30 (rel. June 1998), at iii, (“Having made its ‘commitment’ and been granted its ‘alternative regulation’ reward, ... Bell Atlantic-Pennsylvania ... paid more attention to escaping from, rather than fulfilling, the terms of its promised upgrade.”).

³⁹ “SBC Scales Back Out-of-Region Offices,” Network World Fusion News, March 5, 2001, <http://www.nwfusion.com/news/2001/0305sbcscale.html> (reporting that SBC would keep a skeletal staff in each out-of-region sales office precisely to meet the letter of these merger conditions and little more.)

⁴⁰ *Common Carrier Bureau Seeks Comment on Verizon’s Request to Count Investment in NorthPoint Toward Out-of-Region Merger Obligation*, DA 02-567, CC Docket No. 98-184 (rel. March 12, 2002).

⁴¹ *Telephone Company – Cable Television Cross-Ownership Rules*, Second Report and Order, Recommendation to Congress, and Further Notice of Proposed Rulemaking, CC Docket No. 87-266, 7 FCC Rcd 5781, ¶ 19 (1992).

⁴² See, 47 U.S.C. § 653.

However, at this time, none of the BOCs have built networks capable of providing video programming and other services. In essence, their response to the grant of their requested relief has been no more than to make more demands on policy makers, including that broadband networks not be subject to any common carrier regulation.⁴³ Again, the most reasonable explanation that ILECs have not built the super-broadband networks that they promised is that consumers are not willing to pay for them.

In addition to broken promises, the Commission should evaluate ILECs' promises in light of their unprecedented violations of Commission rules. According to Voices for Choices, the RBOCs have paid over \$1.84 billion in fines since the enactment of the 1996 Act for failure to comply with market-opening rules, Section 271 obligations, and merger commitments.⁴⁴ SBC alone has paid nearly \$640 million in fines and the FCC recently proposed a \$6 million fine for SBC's failure to meet the conditions of its merger with Ameritech.⁴⁵ While these numbers are a drop in the bucket when compared to the ILECs profits, the scale of their non-compliance with the 1996 Act should be a sobering reminder that the Commission would be unable to hold the BOCs to any promise to construct futuristic broadband networks, even if it were established as a regulatory requirement.

⁴³ See, Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, Federal Communications Commission (Jan. 9, 2002), cited at fn. 61, *Broadband NPRM*.

⁴⁴ Voices for Choices, "Telecom Act Anniversary Announcement: "Voices" Coalition Unveils Database of Bell Company Sanctions," available at <http://www.voicesforchoices.com/1091/wrapper.jsp?PID=1091-25&CID=1091-020702A> (Feb. 7, 2002).

⁴⁵ See, <http://www.voicesforchoices.com/1091/wrapper.jsp?PID=1091-42>; *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-003, Notice of Apparent Liability for Forfeiture, FCC 02-7 (rel. Jan. 18, 2002).

In short, the Commission should not put any credence in ILECs' promises to build advanced broadband networks if they are relieved of unbundling obligations. As stated by Steve Ricchetti, co-chairman of Voices for Choices, the ILECs are once again asking the Commission to "watch what we say, not what we do."⁴⁶ The ILECs' record of implementing the requirements of the 1996 Act, and of their "commitments" to the Commission, precludes regulators from assuming that ILECs would actually do what they promise they will do. Further, the Commission should not reward the ILECs' record of intransigence, poor performance, and broken promises by relieving them of the obligations they have chosen to ignore and violate.

For these reasons, there is no basis for the Commission to conclude that elimination of unbundling obligations would promote ILEC deployment of advanced broadband networks. In reality, ILEC arguments on this issue and promises to develop broadband networks are no more than false and self-serving efforts to manipulate policy makers and should be rejected as such.

III. PARTICIPATION IN THE BROADBAND MARKETPLACE IS ESSENTIAL FOR CLECS

The Commission has concluded on three occasions in its annual *Broadband Report* that an advanced telecommunications capability is being provided to all Americans on a reasonable and timely basis. CLECs are actively participating in this deployment.⁴⁷ CLECs, using their own facilities, UNEs, and facilities provided by third parties, where available, are providing consumers and businesses new broadband service options and lower prices. CLECs are

⁴⁶ Wayne Kawamoto, "Coalition Says Verizon is Asking Congress to 'Watch What We Say, Not What We Do,'" CLEC-Planet (Feb. 4, 2002), available at <http://www.clec-planet.com/news/02feb2002/04coalition.html>.

⁴⁷ *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, FCC 02-33, rel. Feb. 6, 2002 (Third Report); 15 FCC Rcd 20913 (2000) (Second Report); 14 FCC Rcd 2398 (First Report).

obtaining current high-capacity UNEs and providing more services at better prices to consumers than do ILECs using their own networks. Thus, the existing network comprised of all of these interconnected components already has a substantial broadband capability, and has had this capability for many years.

As discussed elsewhere in these comments, the pace of deployment of a super broadband capability is, and should be, governed by the marketplace. Under the current regulatory framework, these advanced networks will be built by ILECs, and by others where economically feasible, as the demand for services that could be provided over them develops and it becomes economically possible to provide those services at a price that consumers and businesses are willing to pay. Some expert industry observers have predicted that the public switched network will be converted to a packet-switched fiber broadband network by 2015.⁴⁸ The competitive industry intends to fully participate in the further development of broadband guided by marketplace demands.

ILECs, however, in recent public policy initiatives before the Congress and the Commission are seeking to exclude CLECs from unbundled access to high-capacity network elements that are used in the provision of broadband services. This proceeding and other recently initiated broadband proceedings arguably encompass as a policy matter a possible outcome in which CLECs could be significantly excluded from unbundled access to advanced broadband network elements. In these comments, commenters explain that the Commission should not do so for a number of reasons, including that this would not promote construction by ILECs or others of new broadband networks, and that it would also be unlawful for the

Commission to deny unbundled access to ILEC broadband network elements if the “necessary” and “impair” tests are otherwise met. Nor would it be practical to restrict access to non-broadband network elements since ILECs are deploying an advanced broadband capability as incremental, integrated improvements to the existing network.

In addition, the Commission should not restrict unbundled access to ILEC broadband network elements because it is competitively necessary that CLECs participate in further development of broadband capability and provision of new service options to customers. It is not realistic to expect that CLECs would be able to effectively compete as telecommunications service providers if they could not provide more advanced broadband services as it becomes economically and technically feasible to do so. ILECs have argued in many proceedings over the years that they must be permitted to provide all telecommunications services that customers may request, *i.e.* to be able to provide “one stop shopping,” if they are to be able to compete against new market entrants.⁴⁹ While ILEC participation in competitive markets requires, at a minimum, extensive safeguards, the same marketplace reality requires CLECs to be able to provide further broadband services in order to compete effectively. CLECs will not be able to compete if they are foreclosed, for whatever cause, from participating in provision of new broadband services and are relegated to provision of existing services. Therefore, apart from other reasons which mandate such access, the Commission should affirm in this proceeding that

⁴⁸ See *The Local Exchange Network in 2015*, Lawrence K. Vanston, Ph.D., Technology Futures, Inc., 2001.

⁴⁹ See *e.g.*, *AT&T v. U.S. West Communications*, 16 FCC Rcd 3574, ¶ 15 (2001); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, ¶ 57 (1999); *Ameritech Corp., Transferor and SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 74 (1999).

future ILEC broadband network elements will be fully subject to Section 251(c) unbundling obligations, provided that the statutory unbundling test is met, in order to achieve the competitive goals of the 1996 Act.

IV. THE COMMISSION SHOULD RETAIN ITS INTERPRETATION AND APPLICATION OF THE UNBUNDLING TEST.

A. The *UNE Remand Order* Established the Proper Interpretation and Application of the Statutory Unbundling Test.

1. The Interpretation of the “Necessary” Test for Proprietary Network Elements Should Be Maintained.

The *NPRM* asks whether the Commission should revise its interpretation of “necessary” as used in section 251(d)(2)(A) to determine when competitors are entitled to access proprietary network elements.⁵⁰ That section provides that in determining what network elements should be unbundled under section 251(c)(3), the Commission shall consider whether “access to such network elements as are proprietary in nature is necessary.”⁵¹ The *UNE Remand Order* concluded that a proprietary network element is “necessary” within the meaning of section 251(d)(2)(A) if:

taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.⁵²

The Commission determined that by setting a high bar for competitor access to proprietary network elements, the “necessary” standard protects the *bona fide* intellectual property of the

⁵⁰ See *NPRM* at ¶ 18, n.51.

⁵¹ 47 U.S.C. § 251(d)(2)(A).

incumbent unless lack of access precludes a requesting carrier from offering specific services.⁵³ Commenters believe that the Commission's previous implementation of the "necessary" standard strikes an appropriate balance between allowing competitors access to UNEs while precluding non-essential access.⁵⁴ Commenters find no reason to change this approach to implementation of the "necessary" standard. Accordingly, this standard should be maintained without modification.

2. The "Materially Diminish" Standard for Impairment Should Be Maintained and Applied as Set Forth in the *UNE Remand Order*.

For non-proprietary network elements, Section 251(d)(2)(B) provides that the Commission shall consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."⁵⁵ Under this "impair" standard for non-proprietary network elements, the Commission has determined that it must consider, at a minimum, whether failure to provide access would impair the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer.⁵⁶ The Commission previously considered the factors of "cost, timeliness, quality, ubiquity, and operational issues in making this 'materially

⁵² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3721, ¶ 44 (1999) (emphasis in original) ("*UNE Remand Order*").

⁵³ *See id.* at 3722-23, ¶ 46 ("Our standard, by requiring that a requesting carrier be precluded as a practical, economic, and operational matter from providing service without access to the proprietary information, sufficiently protects the incumbents' proprietary property from nonessential access by competitors.").

⁵⁴ *Id.*

⁵⁵ 47 U.S.C. § 251(d)(2)(B).

diminish' determination."⁵⁷ The *NPRM* asks whether any of these factors should be afforded more or less weight than the others.⁵⁸

Commenters urge the Commission to maintain its "materially diminish" application of the statutory "impair" standard. The Commission should not determine to give greater weight to either cost, timeliness, quality, ubiquity, or operational issues. Each factor on its own is capable of "materially diminishing" a carrier's ability to provide the services it seeks to offer, depending on the circumstances.⁵⁹ Thus, it would thwart a rational determination of impairment to afford *a priori* any one factor less significance than the others when, depending on the specific circumstances, each is independently capable of "materially diminishing" a carrier's ability to compete. Rather, it is only when these factors are considered together and viewed in their totality based on the particular facts presented that an accurate assessment of impairment can be made. Accordingly, Commenters urge the Commission to continue to consider fully each of these factors, consistent with the statutory test as interpreted and applied in the *UNE Remand Order*.

3. The Commission Should Not Establish Impairment Prior to Identification of Network Elements.

⁵⁶ *UNE Remand Order* at 3725, ¶ 51.

⁵⁷ *NPRM* at ¶ 19.

⁵⁸ *Id.*

⁵⁹ See, e.g., *UNE Remand Order* at 3741-42, ¶ 91. In discussing the impact of delays on CLECs the Commission stated "we believe that any delay that a competitive LEC experiences in serving this fast-paced, high-growth market can impair its ability to provide its desired services... incumbent LECs can take advantage of delays caused by the unavailability of unbundled network elements by using their unique access to most customers to gain a foothold in new markets, and, in markets where services may be offered pursuant to long term- contracts (e.g., DSL and other advanced data services) to 'lock-up' customers in advance of competitive entry." *Id.*

The *NPRM* observes that the Commission in the *UNE Remand Order* first defined network elements and then determined whether requesting carriers are impaired without access to those elements. The *NPRM* asks whether the Commission should reverse this approach, by first defining impairments to competitors' ability to provide a service and then identifying network elements that would relieve these impairments.⁶⁰ The Commission should maintain the approach of the *UNE Remand Order* because the alternative suggested in the *NPRM* would harm CLECs' ability to introduce new services.

Commenters are particularly concerned how the Commission's proposal would function as carriers innovate and services evolve over time. It would be impractical and administratively burdensome for the Commission to conduct an impairment analysis every time a CLEC develops a new service. Thus, the alternative approach suggested in the *NPRM* would inevitably thwart or delay CLECs' ability to introduce new services. Conversely, under the current approach, once a UNE is identified, it may generally be used by the CLEC to provide any telecommunications service without the need for conducting an impairment analysis. This approach is most consistent with the goals of the Act.

Moreover, the *NPRM* is silent regarding what benefits would be achieved by the suggested alternative approach to identifying UNEs. Accordingly, the Commission should maintain the current approach of first identifying UNEs and then assessing impairment.

B. The Goal of Broadband Deployment and Section 706 of the 1996 Act May Not Be Used to Weaken the Statutory Unbundling Test.

Section 706 of the 1996 Act directs the Commission to:

⁶⁰ *NPRM* at ¶ 20.

encourage deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing...price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment.⁶¹

In the *NPRM*, the Commission asks whether and to what extent Section 706 should affect its unbundling analysis.⁶²

Commenters submit that it would be unlawful for the Commission to reduce or eliminate unbundling obligations that are found to be appropriate under the “necessary” and “impair” tests in order to promote the goals of Section 706 of the 1996 Act or broadband deployment. For the reasons discussed above, there is no basis for the Commission to conclude that reducing ILEC unbundling obligations would promote broadband deployment. Quite the opposite, it would retard facilities-based competition and the benefits that competition can bring including innovation and lower prices. Therefore, it would be arbitrary and capricious for the Commission to weaken ILEC unbundling obligations in order to promote broadband or the goals of Section 706.

Moreover, the Commission has three times determined that “advanced telecommunications capability” is being provided on a reasonable and timely basis.⁶³ Therefore,

⁶¹ Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157 (47 U.S.C. § 157).

⁶² *NPRM* at ¶ 22.

⁶³ See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report, CC Docket No. 98-146, FCC 02-33 (rel. Feb. 6, 2002) ¶ 1 (“Third Report on Advanced Services”); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 15 FCC Rcd 20,913, 20,914, ¶ 1 (2000) (“Second Report on Advanced Services”); and Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to

it would be arbitrary for the Commission to conclude that diminishing unbundling obligations is necessary or desirable for achieving the goals of Section 706 for the additional reason that the Commission has already determined, in effect, that this is unnecessary.

More broadly, however, the Commission has no authority under the Act to diminish unbundling requirements in order to promote advanced services, or “broadband.” The Commission must, where possible, interpret its statutory mandate as a cohesive whole, reconciling inconsistencies and giving effect to all parts.⁶⁴ The Commission must assume that Congress did not intend to adopt contradictory or conflicting provisions. Therefore, the Commission may not assume that Congress viewed the goals of Section 706 to be undermined by the unbundling obligations of Section 251(c)(3), or *vice versa* if there is a reasonable, non-conflicting interpretation of these separate sections of the Act.

The Commission must accept as a reasonable and consistent interpretation of the Act as a whole that Congress intended the goals of Section 706 to be achieved in part by means of unbundling, as well as by all the other pro-competitive provisions of the Act, rather than that unbundling and Section 706 are conflicting provisions. Indeed, given the overwhelming emphasis in the Act itself and its legislative history showing that Congress intended in the Act to

Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 FCC Rcd 2398, 2405, ¶ 16 (1999) (“First Report on Advanced Services”).

⁶⁴ See, e.g., *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 9 FCC Rcd 1164, ¶ 86 (1993) (citing *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 871-72 (D.C. Cir. 1979) (stating “[the FCC is] bound to take into account the comprehensive statutory scheme, to harmonize, if possible, seemingly contradictory provisions”).

break up ILECs' local telecommunications service monopolies,⁶⁵ the only reasonable interpretation of the Act as a whole is that the Congress intended the goals of Section 706 to be fully compatible with, and to be achieved by, a comprehensive implementation of unbundling obligations.⁶⁶ Nor is there any other basis for assuming that these provisions are in tension or conflicting, because, again, as explained, unbundled access to ILEC networks promotes the goals of Section 706.

Further, Section 706 sets forth the means by which its goals may be achieved, *i.e.* through “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment.”⁶⁷ Section 706, however, does not authorize or envision achieving its goal by

⁶⁵ According to the Joint Explanatory Statement, the purpose of the 1996 Act is “to provide a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition*. . . .” Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d. Sess. at 113 (emphasis added).

⁶⁶ The Commission has already addressed the interplay of Sections 706 and 251 finding that section 706's goals do not supersede or undermine Section 251's market-opening provisions. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011 (1998) (“*Advanced Services Order*”). The Commission rejected various ILEC's view that Section 706 constitutes an independent grant of forbearance authority that could be used to reduce the market-opening objectives of Section 251(c). *Id.* ¶ 69. Instead, the Commission determined that ILEC provision of advanced telecommunications services was fully subject to the key interconnection, unbundling, and resale obligations of the 1996 Act in spite of Section 706, finding that “Sections 251(c) and 271 are cornerstones of the framework Congress established in the 1996 Act” to open local markets to competition. Although this proceeding involved Section 251(c) rather than Section 251(d)(2), Section 251(d)(2)'s importance to the 1996 Act's competitive framework should not be underestimated. Section 251(d)(2) sets forth the standards for determining which network elements must be made available for purposes of Section 251(c). It would be improper for the Commission to use Section 706 to undermine Section 251(d)(2) when its unbundling provisions are part and parcel of the very same market-opening objectives in Section 251(c) the Commission refused to disturb. *Id.* ¶ 76.

⁶⁷ Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157 (47 U.S.C. § 157).

reducing or undercutting the unbundling obligations of section 251(d)(2).⁶⁸ If Congress had intended the Commission to promote broadband by scaling back unbundled access to ILEC network elements, it would have said so. Nor, as explained elsewhere in these comments, does unbundling constitute a barrier to infrastructure investment. Instead, as explained, unbundled access to ILEC networks permits and promotes facilities investment by both CLECs and ILECs.⁶⁹

Further, Section 706 does not mandate, or even express a preference, that its goals be achieved through self-provisioning by competitive carriers, as opposed to using UNEs. Section 706 seeks to encourage the provision of an advanced telecommunications “capability” to all Americans. Such a capability can be provided in a number of ways, either by ILECs using their own facilities, or, CLECs using ILEC facilities in combination with their own facilities. As noted, CLECs purchase unbundled access to high capacity loops and transport and use them more efficiently than the ILEC, and with more advanced technology, to provide a range of voice and broadband services to consumers and businesses at very affordable prices. This meets the goals of Section 706 just as effectively as self-provisioning by CLECs. And, as noted, CLECs are more likely to develop new efficient uses of incumbent network elements than ILECs, who are strongly motivated to preserve revenues from existing, even if inferior, services. In essence, Section 706 is neutral as to whether its goals are achieved by CLECs using unbundled access or CLECs self-provisioning. If Congress had intended Section 706 to be achieved only by self-

⁶⁸ Because unbundling promotes competition, and because Section 706, by its own terms, is to be achieved through measures that promote competition, reducing unbundling would actually undermine Section 706.

⁶⁹ See, Section II, *supra*.

provisioning by CLECs, or if Congress had preferred that approach, it would have said so.

Therefore, UNE-based provisioning of advanced services capability by CLECs is consistent with, and promotes, the goals of Section 706.

Thus, the Commission may not interpret Section 706 as authorizing it to weaken unbundling obligations in order to promote its newly announced overarching goal of provision of broadband, or the goals of Section 706. Rather, the Commission must determine the scope of unbundling obligations in accordance with the “necessary” and “impair” standards and must achieve its broadband goals through the devices that Congress established, namely, unbundling and the other pro-competitive goals of the Act.

Based on recent separate statements and speeches of the current Chairman and some Commissioners, it may be the case that they view unbundling as incompatible with the goals of Section 706, and of the recently announced ascendancy of broadband in the firmament of FCC goals.⁷⁰ However, Congress has expressed a different view as to how any such goals should be achieved, and the Commission may not seek to encourage the deployment of advanced services through the weakening or evisceration of statutory unbundling obligations.

⁷⁰ See, e.g., *Third Report on Advanced Services*, Statement of Chairman Michael Powell at 1 (noting “our demonstrated commitment to spurring broadband deployment is as varied as it is pervasive” and “my firm belief [is] that the Commission’s central policymaking focus is and should remain the promotion of efficient broadband deployment”); Commissioner Kathleen Q. Abernathy, Speech at the Practicing Law Institute Conference (Dec. 13, 2001) (stating “Incumbents have little incentive to deploy new fiber to the curb, for example, if they will have to turn around and hand that fiber to their competitors at TELRIC rates.”); and Commissioner Kevin J. Martin, Remarks at the National Summit on Broadband Deployment (Oct. 26, 2001) (stating “In the past, the Commission adopted a framework that may have discouraged facilities-based competition, allowing competitors to use every piece of the incumbent’s network at super efficient prices).

C. “At A Minimum” Does Not Permit Weakening of the “Necessary” and “Impair” Tests.

Section 251(d)(2) requires the Commission to consider, *at a minimum*, the “necessary” and “impair” standards in designating UNEs. The *NPRM* asks what other factors, in addition to the “necessary” and “impair” standards, the Commission should consider in its unbundling analysis,⁷¹ noting that in the *UNE Remand Order*, the Commission identified five factors that further the goals of the 1996 Act for consideration in its unbundling determination: the rapid introduction of competition in all markets; promotion of facilities-based competition, investment and innovation; reduced regulation; market certainty; and administrative practicality.⁷² The *NPRM* asks whether and to what extent universal service and access charge issues should be considered in the unbundling analysis.⁷³

As discussed above, the Commission may not weaken its application of the “necessary” and “impair” tests in order to promote the goals of Section 706 because Congress intended those goals to be achieved within the pro-competitive framework of the Act, including unbundling. For the same reasons, the Commission may not use “at a minimum” as a general license to weaken the statutory unbundling tests to achieve broadband goals. Instead, the Commission is required to give a meaning to each statutory provision, consistent with the overall framework of the Act.⁷⁴ Therefore, the Commission may interpret “at a minimum” to permit the Commission

⁷¹ *NPRM* at ¶ 21.

⁷² *See id.* ¶ 27.

⁷³ *NPRM* at ¶ 32.

⁷⁴ *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 9 FCC Rcd 1164, ¶ 86 (1993) (stating “[the FCC is] bound to take into account the comprehensive statutory scheme, to harmonize, if possible, seemingly contradictory provisions, and to construe the statute in a manner that does not render certain provisions superfluous”) (citations omitted).

to require unbundling greater than what would be required under a narrow application of the statutory unbundling tests in order to achieve the goals of Section 706. This interpretation is most consistent with the express language in the statute, *i.e.* the Commission must require the unbundling determined under the “necessary” and “impair” tests as the minimum level of unbundling, but may require more based on other goals.

With respect to access reform and universal service goals, Commenters do not believe that in general there is any incompatibility between them and unbundling. Thus, access reform and universal service may be fully achieved under a rigorous program of unbundled access to ILEC network elements. In this connection, the goal of preservation of access charges or universal service does not justify current commingling restrictions on EEL conversions, which should be abolished. The “at a minimum” language of Section 251(d)(2) does not permit the Commission to impose these restrictions on unbundled access to network elements based on these goals if the “necessary” and “impair” tests are otherwise met. Significantly, the Commission has not heretofore employed the “at a minimum” language to restrict unbundling where the unbundling tests are otherwise met, and it would be unlawful for the Commission to do so for the reasons explained herein.

D. Specific More “Granular” Requirements May Be Lawful If Reasonably Related to Impairment, But A More “Granular” Approach Would Not Be Lawful to Promote Broadband Deployment.

The Commission asks whether it could use a more “granular” approach as a tool to promote the deployment of facilities with broadband capabilities.⁷⁵ It is possible that a more “granular” unbundling analysis may be lawful so long as it is no more than a more refined

⁷⁵ NPRM at ¶ 35.

implementation of the statutory “necessary” and “impair” tests. Commenters reserve the right to revisit this issue based on the record gathered in this proceeding. However, the Commission may not institute a more granular approach to unbundling in order to promote broadband deployment. As previously discussed, and for the same reasons, the Commission may not decline to require unbundling where the “necessary” and “impair” standards are met because Congress intended that broadband goals would be achieved through unbundling, not that those goals necessitated or justified limiting unbundling.

E. The Commission Should Establish Impairment for CLECs as a Group But Also Permit Showings of Individual CLEC Impairment.

The *NPRM* asks whether the Commission’s unbundling analysis should consider characteristics of requesting carriers as a whole or individually.⁷⁶ Commenters believe that the Commission should establish impairment for CLECs as a group but also permit individual showings of impairment on a case-by-case basis. Establishing impairment for CLECs as a group is administratively efficient. However, Commenters submit that a CLEC should be permitted to make individual showings to the Commission of actual impairment based on circumstances unique to it. These individual showings may be particularly appropriate under any more granular approach to unbundling because the line drawing inherent in that approach will inevitably miss the mark as applied to some CLECs.

An opportunity for individual showings of impairment will not realistically provide CLECs relief from any unfairness attributable to application of a more granular approach to unbundling unless there is an opportunity for an expedited evaluation of the impairment

⁷⁶ *NPRM* at ¶ 44.

showing. Accordingly, the Commission should establish a process by which CLECs may make, and the Commission may consider, on an expedited basis individual showings of impairment. The Commission should additionally permit states to consider such requests provided that they do so on an expedited basis on at least the same time frame that the Commission would consider the request.

F. Fashioning Triggers for Eliminating or Restricting UNE Availability Is Unrealistic.

The *NPRM* asks whether the Commission should establish temporal boundaries on UNE availability or other sunset provisions that may signal when requesting carriers no longer require access to particular UNEs.⁷⁷ It is unrealistic for the Commission to implement either temporal or non-temporal limitations on UNE availability. The CLEC industry remains in a nascent state and, as demonstrated by market fluctuations over the past two years, it is subject to great uncertainty. As the Commission is acutely aware, the recent economic downturn has been particularly devastating for CLECs and many have been forced to curtail their growth or even contract their business plans, slowing the introduction of competition.⁷⁸ It is simply too soon to be able to predict when it may be appropriate to reduce or sunset unbundling obligations.⁷⁹ Because of the nascent state of the industry and the continuing very modest level of competition and in light of these difficult market conditions, Commenters submit that it is not possible at this

⁷⁷ *NPRM* at ¶¶ 45-46.

⁷⁸ Numerous other CLECs have sought, or are seeking, reorganization under Chapter 11, and some have been liquidated.

⁷⁹ “This is a time of great uncertainty in the economy, for the telecommunications industry, and for competition for both telecommunications and Internet services. ... And we should not create concern, even unwittingly, that our zeal to deregulate before meaningful competition develops might cripple the very competition that Congress sought to engender.” *NPRM*, Separate Statement of Commissioner Michael J. Capps.

time to predetermine when ILEC unbundling obligations should cease. Instead, the Commission should continue with a periodic review of UNEs rather than to restrict UNE availability at this time.⁸⁰

G. Intermodal Broadband Competition Does Not Provide a Basis for Limiting ILECs' Unbundling Obligations

The *NPRM* asks generally how the existence of intermodal competition should affect its unbundling analysis.⁸¹ Assuming *arguendo* there was vibrant intermodal competition in every local market for both broadband and non-broadband telecommunications services, this would be essentially irrelevant to an evaluation of ILEC unbundling obligations. The existence of intermodal competition for end product services to residential and business customers is not equivalent to the availability of wholesale services that could substitute for unbundled access to ILEC network elements. Moreover, intermodal providers are not subject to unbundling obligations. Therefore, vibrant intermodal retail competition, even if it existed, is not probative of whether CLECs are impaired without unbundled access to ILEC network elements.

Local markets characterized by fully developed wholesale intermodal competition could provide evidence that CLECs would not be impaired without unbundled access to ILEC network elements. However, there is essentially no intermodal wholesale competition in any local markets. Thus, the Commission's conclusion in the *UNE Remand Order* that wireless and cable did not present viable alternatives to the ILECs' facilities remains irrefutably valid.⁸² The two

⁸⁰ "These are no doubt merely the opening chapters of a regulatory epic that will take many years to rewrite a near century-long history of legally-sanctioned monopoly in the telephone market." *NPRM*, Separate Statement of Michael K. Powell at 3.

⁸¹ *NPRM* at ¶ 28.

⁸² *UNE Remand Order*, 15 FCC Rcd at 3782, ¶ 188.

major fixed wireless providers - Teligent and Winstar - are both in bankruptcy. Mobile wireless holds promise, but for the foreseeable future is likely to be an adjunct to, rather than a substitute for, wireline service. Satellite providers represent a small part of the advanced services market and also are suffering from the downturn in the telecommunications industry. Cable providers, while controlling a significant percentage of the residential advanced services market, have little penetration in the small and medium business market and virtually none in the market for large business customers. And, cable providers do not make their services or facilities available on a wholesale basis. Therefore, none of these providers present a realistic alternative for ILEC loop and transport facilities. Accordingly, there is no basis for the Commission to conclude that it may limit ILEC unbundling obligations because of either retail or wholesale intermodal competition.

V. SPECIFIC NETWORK ELEMENTS

A. Loop and Subloops Must Continue To Be Available

1. UNE Remand Order

In the *UNE Remand Order*, the Commission concluded that ILECs must provide access to unbundled loops, including, high capacity loops, nationwide.⁸³ The Commission expanded the definition of the loop to include all features, functions, and capabilities of the transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such as DSLAMs), owned by the ILEC, between an ILEC's central office and the loop demarcation point at the customer's premises.⁸⁴ The Commission determined that

⁸³ *UNE Remand Order* at ¶ 165.

⁸⁴ *Id.* at ¶ 167.

CLECs could obtain access to inside wiring, including house and riser cable, as part of the loop (or as a separate subloop element) where the demarcation point extended into a building, including to demarcation points at individual customer premises within a multi-tenant building.⁸⁵ The Commission stated that its intention was to ensure that the loop definition will apply to new as well as current technologies.⁸⁶

The loop is perhaps the most fundamental unbundled network element, and has been since the passage of the 1996 Act. The House and Senate Committee on Conference's Joint Explanatory Statement list local loops as an example of a network element.⁸⁷ In the *UNE Remand* proceeding, nearly all the commenters recognized the fundamental importance of the loop UNE, even the ILECs with some qualifications, generally conceded that a nationwide loop unbundling requirement is compelled by the Act.⁸⁸ The Commission determined that self-provisioning loops is not a viable alternative because replicating an incumbent's vast and ubiquitous network would be prohibitively expensive and delay competitive entry.⁸⁹ Without access to unbundled loops, CLECs would need to invest immediately in duplicative facilities in order to compete for most customers, and the investment, and the accompanying construction

⁸⁵ Id. at ¶¶ 168-171. See also, *Promotion of Competitive Networks in Local Telecommunications, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Review of Sections 68.104, and 68.213 of the Commissions Rules*, WT Docket No. 99-217, CC Docket Nos. 96-97 and 88-57; First Report and Order and FNPRM in WT Docket No. 99-217, Fifth Report and Order in CC Docket No. 96-98 and Fourth Report and Order in CC Docket No. 88-57, FCC 00-377 (Rel. Oct. 25, 2000), at ¶ 51. ("*Competitive Networks Order*").

⁸⁶ Id. at ¶ 167.

⁸⁷ Comments of the Association for Local Telecommunications Services in CC Docket No. 96-98, at 35 (May 26, 1999).

⁸⁸ Reply Comments of the Association for Local Telecommunications Services in CC Docket No. 96-98, at 31 (June 10, 1999).

⁸⁹ *UNE Remand Order* at ¶ 182.

that would be required, “would likely delay, if not prohibit, market entry and postpone, perhaps indefinitely, the benefits of telephone competition for consumers.”⁹⁰ Instead of requiring a large sunk investment on the part of CLECs before they developed the requisite customer base to spread the cost of such investment, permitting CLECs to purchase UNE loops allows CLECs to build facilities where it is efficient to do so.⁹¹

The Commission noted that building loop plant continues to be prohibitively expensive and time-consuming.⁹² The Commission recognized the risk involved in a CLEC building ubiquitous loop plant before the CLEC has established a substantial and secure customer base.⁹³ Since loop plant cannot be scaled to need or relocated, if a CLEC deploys loops and subsequently loses the customer, the CLEC would bear the full loss of customer investment.⁹⁴ Furthermore, duplicating loop plant would require unnecessary and inconvenient digging up of streets once CLECs surmounted the numerous rights-of-way obstacles that would accompany such deployment.⁹⁵ The whole process would take months, if not years, and the CLEC would lag far behind the timely manner in which ILECs can provide service to their customers.⁹⁶ The Commission rightfully concluded that the “cost, risk, disruption, and delay of self-provisioning loop plant, would for many consumers, foreclose the benefits of competition.”⁹⁷

⁹⁰ *Id.* at ¶ 182.

⁹¹ *Id.* at ¶ 183.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at ¶ 186.

⁹⁷ *Id.*

In terms of ubiquity and quality, the Commission determined that while technology such as mobile telephones and fixed wireless offered promise, these technologies were not yet viable alternatives to the ILEC wireline facilities,⁹⁸ even if they were available on a wholesale basis to substitute for UNEs. The Commission observed that the technologies are not as widespread as the ILEC's ubiquitous network, did not offer the same functionality, and the data capabilities were inferior to the data transmission capabilities of wireline facilities.⁹⁹ While cellular and PCS footprints were expanding, they were still not ubiquitous, and millions of Americans were not yet served by wireless carriers.¹⁰⁰ Likewise, cable telephony was not an alternative as cable primarily serves residential customers.¹⁰¹

2. CLECs Would Be Impaired Without Access to UNE Loops

The Commission's analysis in the *UNE Remand Order* of the need for unbundled access to loops remains valid. Considerations of availability, ubiquity, cost and timeliness mandate unbundling of loops.

There is no competitive wholesale market for loops. The ILECs are literally the only game in town when it comes to loop facilities. While CLECs have made substantial investments in network infrastructure, \$56 billion through 2001,¹⁰² this has not translated into a large number of local loop facilities. CLECs have invested significantly in fiber facilities,¹⁰³ but as noted elsewhere in these comments, most of those facilities are long haul, intercity facilities. The

⁹⁸ *Id.* at ¶ 188.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *ALTS 2001 Local Competition Report* at 20.

amount of local, intracity facilities probably numbers in the tens of thousands of fiber miles and most of those are used as interoffice facilities instead of loops to customer premises. The CLEC experience has confirmed what the Commission observed in the *UNE Remand Order*, i.e., that facilities-based competition will not materialize overnight, and that UNE loops will be vital to the rollout of CLEC service.

The cost of duplicating “last mile” facilities to a broad population of end users suggests that a wholesale market for competitive loop facilities will not develop in the foreseeable future. In fact, this scenario is what Congress anticipated as well in creating the unbundling requirement.

As Justice Breyer noted:

[o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition¹⁰⁴

Thus, Congress chose to permit new entrants to build where this was economically feasible but to rely on incumbent facilities where it was not. As discussed previously, the Commission should let the marketplace determine when it is feasible to construct alternatives to the ILEC network.

The downturn in the telecommunications industry and the closing of capital markets also suggests that a competitive market for loops is far in the future. CLECs will not be able to

¹⁰³ *Id.* at 25.

¹⁰⁴ *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 416-417 (1999) (Breyer, J., concurring in part/dissenting in part).

convince investors to sink significant amounts of capital into duplicating ILEC facilities, and directing limited capital resources to such a task would be wasteful and inefficient.

The intervening three years, while demonstrating advances in technologies such as wireless and cable, still has not seen develop a viable alternative to ILEC wireline services. In the *UNE Remand* proceeding, ALTS aptly noted that headlines were ahead of technology in regard to these services, and that still appears to be the case.¹⁰⁵ In regard to wireless services, even with national networks there are still gaps in coverage, and wireless still remains a supplement to wireline as opposed to a substitute. Moreover, the 3G networks that are to fuel broadband over wireless are still waiting to be rolled out. Fixed wireless providers are no greater a competitive threat due in part to the logistical difficulties and technical limitations that constrain its rollout.¹⁰⁶ In fact, during the latter half of 2001, a number of companies offering innovative wireless services either went bankrupt or scaled back their investments in wireless alternatives to local loops.¹⁰⁷ Cable telephony still remains an ancillary service. None of these services provide access that is reasonably substituted or “interchangeable” with the wireline loop.

CLECs would be unable to compete if they were required to construct loops in order to provide service. The retail prices for service would be so high that they would be priced out of the market. Accordingly, the standard wireline loop still remains a fundamental network element and CLECs would be materially impaired without access to the loop.

¹⁰⁵ Comments of ALTS in the *UNE Remand* proceeding, CC Docket No. 96-98, at 37.

¹⁰⁶ *Third Advanced Services Report*, Appendix B, ¶ 34 *et seq.*

¹⁰⁷ Robert E. Hall and William H. Lehr, *Promoting Broadband Investment and Avoiding Monopoly*, at 15 (Feb. 21, 2002).

3. The Commission Should Continue to Require Unbundling of Subloops

In the *UNE Remand Order*, the Commission determined that lack of access to subloops materially impairs a CLEC's ability to compete.¹⁰⁸ The Commission concluded that the access to the subloop would serve as a vital catalyst that will allow competitors, over time, to deploy their own complementary subloop facilities and eventually deploy their own competitive loops. For instance, CLECs would be able to connect their own feeder facilities to the ILEC distribution plant to minimize CLEC reliance on ILEC facilities.¹⁰⁹ Access to the subloop was also determined to be crucial to the competitive provision of broadband services.¹¹⁰

The subloop is defined as the portion of the loop that can be accessed at terminals in the ILEC's outside plant.¹¹¹ In its unbundling analysis, the Commission reached the same conclusion that it did for loops, *i.e.*, that these elements are the most time consuming and expensive network element to duplicate on a pervasive scale, and the cost of self-provisioning subloops can be prohibitively expensive.¹¹²

The Commission found that if the CLEC has already self-provisioned a portion of the loop it should not be required to pay the cost for a full loop.¹¹³ In addition, ILECs sometimes deploy technology, such as integrated digital loop carrier systems, that they view as limiting their ability to provide unbundled access to the entire loop. Therefore, access to the subloop

¹⁰⁸ *UNE Remand Order* at ¶ 205.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *UNE Remand Order* at ¶ 206. An accessible terminal is a point in the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within.

¹¹² *Id.* at ¶ 211.

¹¹³ *Id.* at ¶ 212.

facilitates the provisioning of service to customers that otherwise could not be served by the CLEC,¹¹⁴ although it is not a substitute for end-to-end unbundled access over the loop from the central office to the customer's premise, which always must be available. The subloop is also necessary where the ILEC multiplexes traffic at a remote terminal. In those circumstances, a CLEC may need access to the loop before the traffic is multiplexed, and access to the subloop facilitates this access.¹¹⁵ Access to the subloop is also vital in regard to the provisioning of DSL service.¹¹⁶ Access to the subloop provides the CLEC much needed flexibility in the deployment of its own network architecture.¹¹⁷ This is particularly true with respect to inside wiring, including building riser and horizontal distribution plant.

The importance of access to the subloop has been validated since the Commission designated it a UNE. In fact, ILEC deployment of high capacity loop architecture such as Project Pronto, which uses in part a fiber element that can provide broadband services, has heightened the importance of the subloop. CLECs that need access to copper facilities to support their services need access to the loop at the remote terminal or feeder/distribution interface to migrate the traffic to a copper facility. If the CLEC does not have such access it will not be able to service the customer. Furthermore, access to the subloop remains crucial to those CLECs who self-provisioned parts of their network and only need access to discrete portions of the loop. The subloop will serve a vital transitory offering to the competitive provisioning of loops.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at ¶ 217.

¹¹⁶ *Id.* at ¶ 218.

¹¹⁷ *Id.* at ¶ 215.

Thus, the Commission should continue to require unbundled access to subloops for all the same reasons that it must continue to provide unbundled access to loops, and also based on the catalytic role the subloop may play in the development of facilities-based competition. For the same reasons, the Commission should specifically affirm its determination in the *UNE Remand Order* that CLECs may obtain unbundled access to inside wiring, including riser and horizontal distribution cabling, as a subloop element or part of the loop, up to the demarcation point.¹¹⁸ The Commission should also take this opportunity to expand the points at which CLECs may gain access to the subloop. Access should not be limited to accessible terminals, but should also extend to splice points. A number of state commissions have made this determination, and the Commission should now revisit the issue of what is technically feasible in terms of access to the subloop. For instance, it is technically feasible and consistent with industry practice to lease dark fiber at splice points.¹¹⁹ The Massachusetts DTE has required that access to dark fiber be provided both at splice points and hard termination points, and the Commission should mandate the same type of access to other subloop fiber facilities.¹²⁰

B. Unbundled Access to High Capacity Loops Should Continue

The Commission seeks comment on whether it should continue to require the unbundling of high capacity and dark fiber loops.¹²¹ As noted elsewhere in these comments, high capacity

¹¹⁸ The Commission also should pursue other approaches to eliminate building inside wiring as a bottleneck to competition. *See, e.g.* comments of the Smart Buildings Policy Project in WT Docket No. 99-217 (March 8, 2002).

¹¹⁹ *Consolidated Petitions pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration of Interconnection Agreements*, Massachusetts D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-N, Order at p. 20 (December 13, 1999) (“*MA DTE Phase 4-N Order*”).

¹²⁰ *Id.*

¹²¹ *NPRM* at ¶¶ 52. A high-capacity facility is defined as a facility capable of supporting signals DS-1 or higher. *UNE Remand Order* at ¶ 184.

loops and transport, including DS-1 loops, have been part of ILEC networks for over 20 years. These network elements are fully capable of providing broadband services and are being used for that purpose by CLECs, who, as noted, use DS-1 loops to provide services on a more efficient basis than do ILECs. CLECs may choose to use DS-1 loops instead of DSL to provide service because DS-1 technology is ubiquitously available, more reliable, and less susceptible to environmental conditions.

The Commission was prescient in the *UNE Remand Order* in determining the need for unbundled access to such facilities. Despite ILEC calls to remove the unbundling requirement for these facilities,¹²² the need for the unbundling of these facilities has increased since the *UNE Remand Order*. There, the Commission imposed these unbundling requirements in light of the promise and hope of the development of a competitive market for high-capacity facilities. The requirements were imposed as a means to the end of developing such a market. Now, a combination of factors, including the downturn in the telecommunications industry, the closing of capital markets, and poor ILEC provisioning of such facilities, has precluded the development of such a market. In fact, CLECs are now perhaps more dependent on ILECs for the provisioning of these vital facilities. Thus, the Commission should at the very least maintain these unbundling requirements, and consider enhancing them.

¹²² Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport (CC Docket No. 96-98, Apr. 5, 2001).

1. UNE Remand Order

The Commission, in its *UNE Remand Order*, included dark fiber and high-capacity loops within the definition of the loop.¹²³ The Commission determined that dark fiber represented “unused loop capacity” and fell within the loop network element’s “facilities, functions and capabilities.”¹²⁴ The Commission found that high-capacity loops retain the essential characteristics of a loop, and that while these loops may support different services, the wire facility used for transmission of the traffic is indistinguishable from any other copper wire.¹²⁵

The Commission concluded that it was necessary to unbundle such high-capacity facilities because “building out any loop is expensive, regardless of capacity.”¹²⁶ The Commission determined that because of the expense involved, “it would be extremely difficult for competitive LECs to overbuild the ubiquitous loop plant that the incumbents have built up over decades, even to serve businesses in urban districts.”¹²⁷ The Commission deemed that the enormous sunk investment required would result in competition in patches, rather than the “seamless competitive service of a fully competitive market.”¹²⁸ The Commission also noted that even if CLECs had the necessary financing to overbuild ILEC loops, there would be delays in deploying these loops fueled by lengthy rights-of-way disputes and unnecessary digging up of streets.¹²⁹ Thus, a CLEC could not deploy loops to bring services to its customers as quickly as

¹²³ *UNE Remand Order* at ¶¶ 174-177.

¹²⁴ *Id.* at ¶ 174.

¹²⁵ *UNE Remand Order* at ¶ 176.

¹²⁶ *Id.* at ¶ 184.

¹²⁷ *Id.* at ¶ 185.

¹²⁸ *Id.*

¹²⁹ *Id.* at ¶ 186.

the ILEC could.¹³⁰ The Commission also found that use of high-capacity facilities is vital to the provisioning of advanced services.¹³¹ The Commission found that this same analysis applied to dark fiber, and further determined that “the nascent wholesale market in fiber loop facilities is not yet extensive enough for us to conclude that competitors are not impaired without access to incumbent LECs’ unbundled dark fiber loops.”¹³²

The record developed in response to the RBOCs’ petition seeking elimination of unbundling requirements for high-capacity loops and transport demonstrated unequivocally the need for the Commission to continue requiring the unbundling of these loops.¹³³ In fact, more than 30 sets of comments were submitted in the proceeding and all but one opposed the RBOC petition to remove high capacity loops and transport from the list of nationally available UNEs.¹³⁴ The evidence was uncontroverted, and remains uncontroverted, that considerations of availability, ubiquity, cost and timeliness all counsel for requiring unbundled access to high-capacity loops.

2. Availability and Ubiquity

All indications are that the availability and ubiquity of competitive high capacity facilities has not increased significantly, if at all, since 1999. For instance, the RBOCs’ own evidence suggests that there has been no real change in the CLECs’ special access market share since the

¹³⁰ *Id.*

¹³¹ *Id.* at ¶ 187.

¹³² *Id.* at ¶ 197.

¹³³ Joint Petition of BellSouth, SBC and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98 (filed Apr. 5, 2001) (“*High Cap Petition*”).

¹³⁴ Joint Reply Comments of Allegiance Telecom, Inc. and Focal Communications Corporation to *High Cap Petition*, at 1 (June 25, 2001).

UNE Remand Order was issued.¹³⁵ The ILECs have also conceded that their special access service rates contain significant monopoly profits.¹³⁶ If competitive high capacity facilities were truly available one would expect to see competitive inroads in the special access markets, and lower prices, but that clearly does not appear to be the case. CLECs have only a 15% share of special access and private line services, have penetrated only a small fraction of commercial office buildings, and have only deployed modest amounts of local fiber.¹³⁷ Independent observers note that CLEC fiber only connects to about 3% to 5% of the nation's commercial office buildings, or about 30,000 buildings.¹³⁸ Most of these buildings are carrier hotels, ISP POPs, and very large office buildings where there is demand for several DS-3s or OC-n circuits.¹³⁹ Thus service to these buildings is not an indication of the general availability of high-capacity facilities.¹⁴⁰ These buildings represent only a small percentage of total demand for high-capacity circuits.¹⁴¹ CLECs, at most, have only a few tens of thousands of local fiber route miles.¹⁴²

The record in Docket No. 96-98 provides ample evidence from CLECs that despite major investments in their networks, they have been unable to self-provision high capacity loops.¹⁴³

¹³⁵ Comments of AT&T to *High Cap Petition*, Exhibit 1 at p. 7 (June 11, 2001).

¹³⁶ *Id.*

¹³⁷ *Id.* at 13.

¹³⁸ Comments of WorldCom to *High Cap Petition*, at 7 (June 11, 2001); Comments of Sprint to *High Cap Petition*, at 3 (June 11, 2001).

¹³⁹ *Id.* at 9.

¹⁴⁰ *Id.* at 10.

¹⁴¹ *Id.* at 8.

¹⁴² *Id.* at 3.

¹⁴³ Comments of AT&T to *High Cap Petition*, Exhibit 1 at 10 (June 11, 2001).

The building of a network is a very arduous and time-consuming process. CLECs, despite multibillion-dollar investments in their networks, have been able only to extend their fiber to a small percentage of high-capacity customer locations.¹⁴⁴

Even CLECs with extensive local networks such as WorldCom rely on ILECs for the vast majority of their DS-1 and DS-3 circuits.¹⁴⁵ Moreover, despite a strong desire to obtain facilities from providers other than the ILEC, the ILEC still remains the sole option for CLECs for high-capacity loops and transport. Focal, which has a policy mandating the use of competitive facilities where available, has found that it usually has no alternative but to purchase from the ILEC.¹⁴⁶

In their Petition, the RBOCs did not purport to measure the number of high capacity local loop facilities CLECs either build or lease from third-party alternative providers. Rather, they cite to 218,000 alternative local fiber route miles without distinguishing between long-haul, local transport, and local loop miles or planned versus operational fiber; 635 alternative local fiber networks in the top 150 Metropolitan Statistical Areas (“MSAs”) (again without distinguishing between transport networks and local loops); and CLEC service to 25% of the nation’s commercial buildings.¹⁴⁷ As unequivocally demonstrated in comments in response to the Petition, however, the RBOC statistics are not reliable.¹⁴⁸

¹⁴⁴ Comments of WorldCom to *High Cap Petition*, at 9 (June 11, 2001) (“*WorldCom High Cap Comments*”).

¹⁴⁵ *Id.* at 8.

¹⁴⁶ Joint Comments of Allegiance Telecom, Inc. and Focal Communications Corporation to *High Cap Petition*, at 8 (June 11, 2001) (“*Allegiance/Focal High Cap Comments*”).

¹⁴⁷ *High Cap Petition* at 3-4.

¹⁴⁸ See *Allegiance/Focal High Cap Comments* at 18-24 (June 11, 2001); Joint Comments of Broadslate Networks, Inc., Network Plus, Inc., RCN Telecom, Services, Inc., and Telergy, Inc. to *High Cap Petition*, at 9-15

Since the Commission is incorporating in this proceeding the record in response to the RBOC petition,¹⁴⁹ Commenters will not go into detail as to the shortcomings of the RBOC data since these shortcomings have already been extensively documented. It is clear, however, that the RBOCs significantly overstated the amount of competitive fiber available that could serve as an alternative to RBOC loop and transport facilities. For instance, the RBOCs did not distinguish between long haul, inter-city fiber, and local, intra-city fiber.¹⁵⁰ Only intracity fiber facilities can serve as a potential substitute for BOC UNE high capacity loop facilities, and in regard to those facilities, CLECs would still remain materially impaired without access to those UNEs.

The availability of wholesale local fiber is limited. For instance, many of the wholesale networks that the USTA Report (cited in the RBOC Petition) proffered as alternatives are planned but not yet deployed and those that are operational cover between two and 26 cities, depending on the provider.¹⁵¹ Thus, for many CLECs, these wholesale providers do not have fiber in the markets where the CLEC seeks to provides service.¹⁵² In short, most of their alternative fiber is only “theoretically available,” not “actually available.” Of the nine wholesale providers “profiled” by USTA, three are planning or building networks but do not have them up

(June 11, 2001) (“*Broadslate/Network Plus/RCN/Telergy High Cap Comments*”); Opposition of AT&T Corp. to *High Cap Petition* at 8-9 (June 11, 2001); *WorldCom High Cap Comments* at 7-9; Covad Communications Company’s Opposition to *High Cap Petition*, at 8 (June 11, 2001); Comments of Sprint Corporation at 3-4 (June 11, 2001) (“*Sprint High Cap Comments*”).

¹⁴⁹ *NPRM* at ¶ 12.

¹⁵⁰ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 10.

¹⁵¹ See USTA Report at 17-20. MFN is operational in 11 cities, Fiberworks in two, Yipes and Telseon in 20, Telergy in four, and NEON in 26.

¹⁵² *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 11-12.

and running.¹⁵³ Furthermore, two of the “wholesalers” USTA cites as providers of alternative facilities – Yipes and Telseon – even according to USTA do not construct any network facilities – they assemble them from other carriers.¹⁵⁴ In addition, many of these providers may also rely on ILEC facilities to complete their networks.¹⁵⁵ Moreover, several members of the Coalition of Fiber Providers cited by the BOCs’ as hard evidence of the availability of local fiber networks are in the process of being liquidated, have terminated domestic operations, or have drastically scaled back their business plans.¹⁵⁶ For most CLECs, the ILEC is the only source of the high-capacity loop facilities in the markets in which they operate.¹⁵⁷ Thus, a “vibrant wholesale market” simply does not exist for high capacity loops.

According to FCC statistics, at the end of 1999, ILECs had 790,145 DS-1 fiber terminations at customer premises and 247,066 fiber terminations at speeds of DS-3 or higher.¹⁵⁸ The total number of high capacity loops are likely much higher, as these statistics do not include the fiber terminations ILECs added since then or copper terminations used for DS-1 and above facilities. If high-capacity loops are removed from the UNE list, CLECs would be denied unbundled access to at least 1,037,211 ILEC loops and, unless alternative last mile facilities were

¹⁵³ See, USTA Report at 17-20.

¹⁵⁴ USTA Report at 18-19. Yipes has recently filed for bankruptcy. *Investors Push Yipes to Take A Mulligan*, Telephony, April 1, 2002.

¹⁵⁵ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 12.

¹⁵⁶ Telergy, Inc. is in Chapter 7 liquidation. El Paso Global Networks has scaled back its \$5 billion nationwide plan to focus on Texas.

¹⁵⁷ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 10; *AT&T High Cap Comments*, Exh. 1 at 12; *Covad High Cap Comments* at 12; *Allegiance/Focal High Cap Comments* at 6.

¹⁵⁸ Infrastructure of the Local Operating Companies, Table 2.1 (October 2000) (“Infrastructure Report”).

available, the customers served by them.¹⁵⁹ The evidence is unequivocal that denying unbundled access to these loops would leave CLECs with no alternative means of providing these facilities either through self-provisioning or through wholesale providers.

3. Cost and Timeliness

Even if a central office or customer location may generate enough traffic such that self-provisioning may be a consideration, as the Commission noted there are numerous factors that impair the ability of CLECs to self-provision high capacity loops. Foremost amongst the factors is the high cost, particularly if there is a significant distance between the customer's premises and the central office. In addition, there are numerous hurdles that must be surmounted even before construction can begin such as rights-of-way and building access issues.¹⁶⁰

Building fiber to the customer premises is still the most capital-intensive way of installing local broadband capacity. The *City Light Investor's Guide* estimates that fiber deployment costs \$100,000 to \$300,000 per mile for placing fiber underground, \$50,000 per mile for placing fiber on poles, and \$10,000 to \$60,000 per mile for placing fiber in pipelines.¹⁶¹ These figures are in most instances far greater than the \$46,680 per mile cost the FCC cited in the *UNE Remand Order*.¹⁶² Adding a building to a CLEC network generally averages \$250,000 and the cost increases significantly if the building is more than a mile from the CLEC's existing

¹⁵⁹ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 17.

¹⁶⁰ *AT&T High Cap Comments*, Exh. 1 at 12.

¹⁶¹ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 19.

¹⁶² *UNE Remand Order* at ¶ 184, n.343.

network.¹⁶³ Sprint was quoted a rate of over \$1 million per mile by an alternative access provider to construct fiber loop in metropolitan areas.¹⁶⁴

The closing of capital markets to CLECs has exacerbated cost concerns. Many of the CLECs that fueled the late-1990s fiber construction are now in financial distress, or have declared bankruptcy. Those CLECs that have survived are finding it harder to get financing to continue deployment of their networks. As WorldCom observes, “there is no prospect that CLECs will have sufficient capital to undertake network construction at the pace of the late 1990s, much less reduce their reliance on ILEC high-capacity loops and transport to a significant degree.”¹⁶⁵ The financial downturn has reduced the availability of alternative sources of access and made it more difficult for CLECs to self-provision facilities.¹⁶⁶ If there were a thriving alternative wholesale market for high-capacity facilities, capital markets would be “pouring in billions of dollars to fund construction of competitive networks, and the prices of special access services would be plummeting.”¹⁶⁷ Unfortunately, just the opposite is occurring. For example, BellSouth and other ILECs are raising prices for special access.¹⁶⁸ In addition to showing that

¹⁶³ *WorldCom High Cap Comments* at 10. WorldCom notes that it would only add buildings more than a mile from its network as part of the construction of a new fiber ring, which is a multi-million dollar project. *Id.* at 11. If the customer demand in a building is a DS-3 or less, WorldCom would not even consider adding the building to its network because leasing the facilities as a UNE leads to a much lower per-unit cost. For instance, the cost of an unbundled DS-1 loops is usually between \$60 and \$100 per month. *Id.*

¹⁶⁴ *Sprint Comments* at 4.

¹⁶⁵ *WorldCom High Cap Comments* at 3.

¹⁶⁶ *Sprint High Cap Comments* at 5.

¹⁶⁷ *AT&T High Cap Comments*, Exh. 1 at 29.

¹⁶⁸ CC Docket No. 01-337, Comments of Ad Hoc Telecommunications Users Committee at 11-12 (March 1, 2002).

the Commission's pricing flexibility rules are not working, these special access price increases show that there is not a thriving competitive market for high capacity services.

Moreover, construction costs are only one of the many costs providers must consider when determining whether to deploy their own fiber. In addition to construction costs, a CLEC must consider the permitting and rights-of-way fees it must pay to local jurisdictions, and the costs of installing or accessing intra-building wiring.¹⁶⁹ Deploying local loop plant also may embroil CLECs in lengthy franchising or rights-of-way disputes resulting in material delays of greater than six months to one year.¹⁷⁰ Meanwhile ILECs already have municipal rights-of-way.¹⁷¹ ILECs due to their ubiquitous networks can provision new special access circuits within 20 days.¹⁷²

Thus, the costs of deploying local loops and the time it takes CLECs to deploy them have not changed significantly since the *UNE Remand Order*, and the closing of capital markets has made the task even more difficult. Even if the CLEC obtains the necessary financing, costs of between \$10,000 and \$300,000, and beyond, per mile and rights-of-way and building access negotiation delays of six to twelve months or more still materially impair a CLEC's ability to deploy high capacity local loops. Absent unbundled access to high capacity loops, CLECs would only be able to serve the very largest of business customers. Thus, consumers and small and medium business customers would not be able to obtain the lower prices and new service choices that competition can provide.

¹⁶⁹ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 19.

¹⁷⁰ *Id.*; *WorldCom High Cap Comments* at 13.

¹⁷¹ *Sprint High Cap Comments* at 5.

¹⁷² *WorldCom High Cap Comments* at 13.

C. Unbundled Access To The Network Interface Device Must Be Preserved

The Commission in the *UNE Remand Order* expanded the definition of the Network Interface Device from a more formalistic definition to a more conceptual and functional one. The definition moved beyond the particular device to encompass “any means of interconnection of a customer premises wiring to the incumbent LEC’s distribution plant.”¹⁷³ In doing so, the Commission recognized the fundamental reality that the utility of unbundled access to loops would be undermined unless the CLEC had unbundled access to the device that connects the loop to the customer’s premises. Thus, the Commission required that an ILEC must permit a requesting carrier to connect its own loop facilities to the inside wire of the premises through the ILEC’s network device.¹⁷⁴ The Commission recognized that while the device itself may not be that expensive, the significant labor and construction costs that a CLEC would have to incur in self-provisioning a NID through visiting the premises of every customer and installing the device would render self-provisioning cost-prohibitive.¹⁷⁵ The cost would be particularly high in the residential and small business market given the number of customer premises locations.¹⁷⁶ The Commission found that requiring CLECs to install numerous, redundant NIDs would constitute a “substantial economic and political barrier to market entry,” and a “needless waste of carrier resources.”¹⁷⁷ The cost/benefit equation of self-provisioning the NID has not changed since the *UNE Remand Order*. Self-provisioning NIDs at numerous locations would cause CLECs to

¹⁷³ *UNE Remand Order* at ¶ 233.

¹⁷⁴ *Id.* at ¶ 237.

¹⁷⁵ *Id.* at ¶ 238.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

incur duplicative expense and delay the time frame in which they are able to provide service to particular customers.

Importantly, the Commission determined that unbundling the NID “will accelerate the development of alternative networks, because it will allow requesting carriers to efficiently connect their facilities with the incumbent’s loop plant.”¹⁷⁸ Thus, like the subloop, the NID serves as a crucial catalyst to facilities-based competition. Unbundling the NID promotes facilities-based competition by allowing carriers to reduce their reliance on the incumbent by interconnecting their own facilities closer to the customer. Unbundling the NID provides much needed flexibility for CLECs in terms of deploying their architecture and at the same time saves them from the duplicative and wasteful task of having to deploy redundant facilities.

D. The Commission Must Continue To Mandate Unbundled Access To Interoffice Transmission Facilities

Commenters applaud the Commission’s efforts over many years to foster a competitive market for interoffice transport.¹⁷⁹ The Commission’s decision in the *Collocation Remand Order* establishing a firm basis for ILECs’ obligation to provide cross-connect services to CLECs collocated in ILEC central offices will greatly facilitate development of a competitive market for interoffice transmission services.¹⁸⁰ Commenters believe that interoffice transport could, in time, and after capital markets have reopened for business with telecommunications companies, be an area where a fully competitive market could develop. At the same time, these

¹⁷⁸ *Id.* at ¶ 240.

¹⁷⁹ See e.g., *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) and its *progeny*.

¹⁸⁰ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, FCC 01-204, ¶ 55 *et seq.* (August 8, 2001).

rules have only just been implemented and, in any event, have been appealed by ILECs.¹⁸¹

ILECs are also thwarting the ability of competitive fiber providers to extend fiber into central offices.¹⁸² It is possible that a more complete implementation and interpretation of the Act by the Commission could remove remaining impediments to development of a fully competitive market for interoffice transport. For the time being, however, for the reasons discussed below, CLECs remain impaired without unbundled access to interoffice transport.

The Commission in the *UNE Remand Order* determined that requesting carriers are impaired without access to unbundled dedicated and shared transport facilities.¹⁸³ While the Commission did find the existence of competitive transport facilities on certain point-to-point routes, it found that self-provisioned transport, or transport from non-ILEC sources, is not sufficiently available as a practical, economic, and operational matter to warrant exclusion of interoffice transport from an ILEC's obligations at the time.¹⁸⁴ Alternative forms of interoffice transport are still not sufficiently available as a practical, economic or operational matter.¹⁸⁵ For these reasons, the Commission should still require ILECs to offer unbundled access to their interoffice transmission facilities nationwide.

¹⁸¹ *Verizon, et al., v. FCC*, Case No. 01-1371 (D.C. Cir. 2001).

¹⁸² *Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as Amended, to Central Office Facilities of Incumbent Local Exchange Carriers*, Petition for Declaratory Ruling by Coalition of Competitive Fiber Providers, CC Docket 01-77 (filed March 15, 2001).

¹⁸³ *UNE Remand Order* at ¶ 321.

¹⁸⁴ *Id.*

¹⁸⁵ Moreover, even if some competitive interoffice transport providers do exist, they typically are not meaningful alternatives because the ILECs refuse to coordinate end-to-end testing, and therefore force CLECs to use ILEC facilities for the whole route.

1. The Commission Should Continue to Unbundle High-Capacity Dedicated Transport Facilities

Dedicated transport is defined as “incumbent LEC transmission facilities dedicated to a particular customer or carrier that provides telecommunications between wire centers owned by ILECs or requesting telecommunications carriers, or between switches owned by ILECs or requesting telecommunications carriers.”¹⁸⁶ The Commission reaffirmed its determination made in its *Local Competition Order* that dedicated transport includes all technically feasible capacity-related services such as DS-1, DS-3, and OC-3--OC-96.¹⁸⁷ The Commission clarified that the unbundling obligations would extend through OC-192 services, and such higher capacities as evolve over time.¹⁸⁸ The Commission also expanded the definition of dedicated transport to include dark fiber.¹⁸⁹ Despite large amount of “data” submitted by ILECs as to the purported availability of competitive fiber, the Commission found that the record actually supported the proposition that competitive fiber was not sufficiently available.¹⁹⁰ The Commission found that competitive fiber, where available, was not available on a ubiquitous basis. Thus, CLECs, without access to unbundled dedicated transport, would be required to rely on a patchwork of alternative network facilities, where such facilities exist, or deploy their own facilities.¹⁹¹ The Commission observed that even though some alternative fiber facilities did exist, there were few, if any, alternative facilities outside the ILECs’ networks that connect all or most of an ILECs’

¹⁸⁶ *Id.* at ¶ 322.

¹⁸⁷ *UNE Remand Order* at ¶ 323.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at ¶ 323.

¹⁹⁰ *Id.* at ¶ 338.

¹⁹¹ *Id.* at ¶ 341.

central offices and IXC points of presence within a MSA.¹⁹² The Commission concluded that CLECs required dedicated transport facilities that are more extensive than those that are being currently deployed along the point-to-point routes.¹⁹³

(a) Availability and Ubiquity

In examining the availability of fiber for transport, it is important to distinguish local fiber from long-haul fiber. When the RBOCs presented evidence that co-mingled local and long-haul fiber deployments in 1999, the Commission categorically rejected that data as insufficient for determining the availability of alternative local transport.¹⁹⁴ The Commission noted “that the ‘fiber frenzy’ and ‘bandwidth markets’ cited by the incumbent LECs *are largely limited to portions of inter-city, long-haul networks that do not ubiquitously reach the interoffice segments of the incumbent LEC’s network.*”¹⁹⁵ Because long-haul fiber facilities are not substitutes for local transport facilities, the Commission must continue to focus on the amount of fiber actually available as alternatives to ILEC interoffice facilities.

There still is a lack of alternative transport facilities. Alternative transport is available to less than 15% of RBOC wire centers.¹⁹⁶ As WorldCom notes, “many wire centers with CLEC transport have only a single CLEC alternative, can be reached using CLEC transport only by

¹⁹² *Id.* at ¶ 343.

¹⁹³ *Id.* at ¶ 346.

¹⁹⁴ *See UNE Remand Order* at ¶ 350-51.

¹⁹⁵ *Id.* at 350 (emphasis added).

¹⁹⁶ Comments of WorldCom at 15.

using less efficient routing, or can be reached using CLEC transport only if the requesting carrier incurs the additional cost of coordinating multiple vendors.”¹⁹⁷

The Commission has established as the vital consideration in determining the viability of alternative transport facilities whether those facilities provide connectivity throughout the ILEC network. In the *UNE Remand Order*, although the Commission acknowledged CLEC deployment of “interoffice transport facilities along selected point-to-point routes, primarily in dense market areas,” it found that “competitive transport facilities that currently exist do not interconnect *all* of an incumbent LEC’s central offices,” thus *per se* failing the ubiquity requirement of the impairment test.¹⁹⁸ This ubiquitous deployment of competitive transport facilities is not currently present and would require a monumental reconstruction of the ILEC interoffice network. AT&T notes that it utilizes special access circuits to 11,500 central offices, with each central office generally connected to two AT&T points of presence. AT&T observes that requiring it to obtain facilities to service these 21,000 central office-POP routes from non-ILEC suppliers would be impossible.¹⁹⁹ AT&T demonstrated that it also would be economically infeasible to build facilities in each of these locations, and, therefore it must rely on the use of ILEC facilities to access the central offices.²⁰⁰ WorldCom notes that it provides DS-1 and DS-3 circuits in 6800 RBOC wire centers, and it must rely mainly on ILEC transport.²⁰¹ For WorldCom to extend its network to an additional ILEC central office it costs at least \$1 million,

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (emphasis added).

¹⁹⁹ *AT&T High Cap Comments* at 11.

²⁰⁰ *Id.*

²⁰¹ *WorldCom Comments* at 16.

and costs much more if the central office is far from the ILEC network.²⁰² Such an investment is generally cost-prohibitive unless the route is short and the traffic density is high.²⁰³ In short, ILEC facilities continue to provide the only ubiquitously available and efficient means of transport for CLECs.

Despite this Commission's requirement that CLECs be allowed to interconnect at one single point in a LATA, it has been well documented that ILECs have been forcing CLECs to interconnect at a number of interconnection points. For instance, Verizon's inclusion of language requiring a "Geographically Relevant Interconnection Point (GRIP)" in interconnection agreements effectively denies competing carriers the right to select a single point of interconnection because GRIP requires competitive carriers to build additional and unnecessary interconnection points. Or, alternatively, the CLEC is required to bear the costs of Verizon's transport from Verizon's designated interconnection point (IP), which is usually its end office tandem, to the actual competitive LEC physical point of interconnection (POI), thereby improperly shifting to competing carriers inflated transport and switching costs associated with such an arrangement.²⁰⁴ The Commission has declined to address the merits of the ILEC's impermissible cost shifting noting that this is an issue it is addressing in the *Intercarrier Compensation NPRM*.²⁰⁵ The requirement of multiple points of interconnection, however, makes it all the more important that interoffice transport, particularly high capacity facilities,

²⁰² *Id.* at 20.

²⁰³ *Id.* at 21.

²⁰⁴ See *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, FCC 01-269, 16 FCC Rcd. 17419, at ¶100, n.341 (2001) ("Pennsylvania 271 Order").

²⁰⁵ *Id.* at ¶ 100.

remain a UNE. If CLECs had to purchase facilities to transport this traffic from ILEC tariffs at non-TELRIC rates, it would be cost prohibitive for CLECs to transport traffic. In a typical market, there are only about ten to thirty central offices that have competitive access providers in them, so CLECs have few alternatives to the ILEC for transport. As noted below, even when a competitive access provider is collocated in a central office, this does not provide a realistic alternative to ILEC facilities. Thus, the ILEC practice of requiring multiple points of interconnection makes it all the more vital that interoffice transport continue to be available as a UNE.

ILEC pricing and provisioning of special access services is strong evidence of the lack of alternatives to CLECs for high-capacity facilities. CLECs pay exorbitant special access rates, running sometimes over 100% to 200% over the UNE transport rates and endure protracted provisioning delays for such facilities because they have no alternative.²⁰⁶ If there were alternative transport facilities, BellSouth and other ILECs would not be able to raise special access prices which, by itself, demonstrates that there is not a competitive market for high capacity facilities.²⁰⁷ Several of the commenters have previously explained to the Commission the apparent ILEC strategy of effectively compelling CLECs to purchase special access by means of poor UNE provisioning, including unlawful “no facilities” practices.²⁰⁸ However, this

²⁰⁶ *Id.* at 17.

²⁰⁷ *See* p. 58, *supra*.

²⁰⁸ *See* Comments of Focal Communications Corp., Pac-West Telecomm, Inc., and US LEC Corp. to *Performance Measurements and Standards for Unbundled Network Elements and Interconnection NPRM* in CC Docket No. 01-318, and *Performance Measurements and Standards for Interstate Special Access Services NPRM* in CC Docket No. 01-321, at 2-4 (Jan. 22, 2002).

has not prevented ILECs, especially BellSouth, from providing poor provisioning for special access once the CLEC is locked into that service.²⁰⁹

ILEC control over bottleneck last mile facilities makes reliance on ILEC transport a necessity. As of June 2001, ILECs still controlled 186,825,000 access lines.²¹⁰ Of the 16,397,000 access lines “provided” to end users by CLECs, at least 64.9% are effectively controlled by the ILECs because CLECs acquire those lines through resale or local loops purchased from the ILECs.²¹¹ In order to obtain access to those loops, CLECs must collocate at the ILEC central offices where the loops terminate. In order to connect those loops to their switches, CLECs must build or purchase interoffice transport to connect their collocation arrangements to their switches. Without the availability of alternative interoffice transport to *each* ILEC central office where CLECs provide service using unbundled local loops, CLECs will have no practical access to these loops, and thus will be unable to provide service to the vast majority of telephone customers in the United States.²¹²

Denying CLECs unbundled access to dedicated transport will also preclude use of enhanced extended loops (“EELs”). EELs theoretically permit CLECs to reduce their costs of collocation by minimizing the number of central offices at which they must collocate to have access to loops. Without the availability of any dedicated interoffice transport, CLECs will no

²⁰⁹ See Comments of US LEC Corp. and XO Georgia, Inc. to *Joint Application by BellSouth Corp. et al for Provision of In-Region, InterLATA Services in Georgia and Louisiana* in CC Docket No. 02-35, at 7-20 (March 4, 2002).

²¹⁰ FCC, LOCAL TELEPHONE COMPETITION: STATUS AS OF JUNE 30, 2001, Table 4 (rel. Feb. 27, 2002).

²¹¹ *Id.*, Table 3. Although this table shows that CLECs provide service to 33% of their end users over their own local loop facilities, the FCC questioned whether this data was accurate. See *Id.* at 1-2, n.3.

²¹² *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 25.

longer be able to use EELs to reach customers served by ILEC central offices in which density may not justify the cost of collocation.

The fact that RBOCs have increased the number of collocation arrangements they provide to CLECs is of no significance. Numerous collocation arrangements are worthless if CLECs cannot obtain the transport necessary to connect their collocation arrangements to their switches. Even then, evidence of at least one CLEC wire center collocation that relies on a third party transport provider – deemed relevant for evaluating whether ILECs should receive pricing flexibility for certain interstate access services based on the existence of competition for those services reflected by the collocated facilities – is irrelevant to the impairment analysis required under the local competition provisions of the Act.²¹³ The RBOCs have alleged that 183 of 320 MSAs have at least one fiber-based collocater.²¹⁴ Aside from the fact that the RBOCs do not answer the more relevant inquiry which is whether the RBOC permits that fiber-based collocater to interconnect with other collocated CLECs, their statistic utterly fails to show that alternative transport is ubiquitously available. Even if one agreed that the majority of CLECs purchase unbundled local loops from only 25% of ILEC central offices, the existence of a single “fiber-based collocater” in those central offices does nothing to show the availability of alternatives in the remaining ILEC central offices. For some CLECs, the ILEC is the only source of these loop and transport facilities in the markets in which they operate.²¹⁵ Further, even in the rare

²¹³ *UNE Remand Order* at ¶¶ 131-32.

²¹⁴ *Petition* at 4-5.

²¹⁵ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 26.

instances where CLECs have access to another collocated CLEC's spare fiber, it often takes the ILEC months to make the connection necessary for the CLEC to use such alternative fiber.²¹⁶

Finally, the FCC also previously rejected the significance of USTA evidence regarding the deployment of competitive fiber networks "nearby" incumbent LEC wire centers:

We note that the incumbents do not explain what is meant by fiber that is "nearby." Nor do incumbents explain how having fiber "nearby" reflects the availability of ubiquitous transport alternatives.²¹⁷

Furthermore, as evidenced by the Petition filed by the Coalition of Competitive Fiber Providers, ILECs often refuse alternative fiber providers' requests to bring their fiber into ILEC central offices. As the Coalition's Petition states:

Coalition members need to access ILEC central offices for the purpose of providing service to CLECs collocated there. However, ILECs, with the exception of Verizon in former Bell Atlantic territory, do not permit competitive fiber providers to do so. ILECs in the *Collocation Remand Proceeding* contend that competitive fiber providers have no right to collocate in ILEC central offices under Section 251(c)(6) because they do not interconnect with the ILEC or access the UNEs of the ILEC. ILECs do not permit CLECs generally, or competitive fiber providers in particular, to access poles, duct, conduit, or rights-of-way leading to, and in, ILEC central offices pursuant to Sections 251(b)(4) or 224(f)(1).²¹⁸

The RBOC refusal of third party supplier access to their central offices further undercuts their proposition that dedicated transport alternatives are ubiquitously available.

²¹⁶ *Id.*

²¹⁷ *UNE Remand Order* at ¶ 342.

²¹⁸ *Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as Amended, to Central Office Facilities of Incumbent Local Exchange Carriers*, Petition for Declaratory Ruling by Coalition of Competitive Fiber Providers, CC Docket 01-77 (filed March 15, 2001).

(b) Cost and Timeliness

The Commenters have already discussed the high cost of extending CLEC networks to additional ILEC central offices. The time to provide service may also be longer for interoffice transport because the longer metro backbones necessary to connect metro to suburban markets are more likely to cross multiple permitting jurisdictions than shorter local loops, potentially increasing the time necessary to deploy alternative transport facilities. The costs of deploying interoffice transport and the time it takes to deploy such transport have not diminished since the FCC adopted the *UNE Remand Order*.²¹⁹

As shown above, dedicated transport still meets the impair test. Alternatives to ILEC unbundled dedicated transport are not actually available on a ubiquitous basis. Furthermore, both the cost of deploying dedicated transport and the time it takes to deploy would materially impair a CLEC's ability to provide service to end users.²²⁰ If neither unbundled transport nor alternative transport were available, a CLEC would be forced to purchase tariffed special access service from ILECs which would, on average, increase the CLEC's cost by a factor of five.²²¹ The Commission should therefore keep dedicated transport on the UNE list.

2. The Commission Should Ensure That Dedicated Transport Facilities Are Available at TELRIC Prices

In order for CLECs and ILECs to exchange traffic between their respective customers, they must interconnect their networks. Under Section 251(c)(2) of the Act, ILECs are required to provide any requesting telecommunications carrier with interconnection that is equal in quality

²¹⁹ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 28.

²²⁰ *Broadslate/Network Plus/RCN/Telergy High Cap Comments* at 28.

²²¹ *Id.*

to that provided by the ILEC to itself on rates, terms and conditions that comply with Section 252. The FCC has interpreted the term “interconnection” to mean “the physical linking of two networks for the mutual exchange of traffic.”²²² It has also adopted “a cost-based methodology for states to follow in setting interconnection . . . rates.”²²³ In approving SWBT’s Section 271 application for the State of Texas, the FCC took note that while CLECs may choose any method of technically feasible interconnection, ILEC “provision of interconnection trunking is one common means of interconnection.”²²⁴ CLECs often used dedicated transport facilities to facilitate this interconnection. RCN, for instance, utilizes ILEC transport facilities to interconnect its network (*e.g.*, switches, etc.) with the ILEC’s network (tandem switches, end office switches, etc.) under the expectation of paying for such interconnection transport at cost-based UNE dedicated transport rates. Importantly, CLECs are harmed in their ability to turn up a market to begin serving customers, or augment its network or alleviate a blocking situation in an existing market, unless the ILEC provides quality interconnection facilities at cost-based prices.

Although the Act and FCC rules entitle CLECs to purchase cost-based facilities for interconnection purposes, some ILECs refuse to sell CLECs cost-based transport, *i.e.*, “UNE Dedicated Transport,” for interconnection trunks. For example, Verizon in three different states, refuses to provide RCN cost-based interconnection facilities and forces RCN to order such facilities from Verizon’s interstate special access tariff. Notwithstanding the fact that this

²²² *Local Competition Order* at ¶ 176.

²²³ *Id.* at ¶ 625; *see also* 47 C.F.R. §§ 51.501, 51.503(b).

²²⁴ *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 64 (rel. June 30, 2000).

position is completely inconsistent with FCC precedent, Verizon requires RCN to purchase interconnection facilities at higher rates that do not comply with the cost-based pricing requirements of Section 252(d)(1) and FCC rules. However, given the choice of obtaining a necessary input or foregoing it, some CLECs make a business decision to purchase special access circuits to achieve speed to market. Nonetheless, this forced choice comes at great expense to the CLEC. As RCN and others have shown in comments filed previously in CC Docket 96-98, and as noted *supra*, purchasing special access instead of cost-based transport could increase a competitors' costs by a factor ranging to over seven, depending on the market at issue.²²⁵ Thus, by requiring a CLEC to purchase special access instead of cost-based UNE dedicated transport for interconnection facilities, an ILEC can create a substantial cost disadvantage for its competitors and discriminate in favor of its own operations.

In order to preclude this form of price discrimination, as part of this proceeding, the FCC should clarify that ILECs may not refuse to provide CLECs cost-based transport, such as UNE dedicated transport, when such transport will be used for interconnection trunks.

In addition, the Commission must preclude ILEC requirements that a CLEC must collocate in every ILEC central office to be able to obtain TELRIC prices for dedicated transport facilities. As discussed above, it is the very cost of adding ILEC central offices to CLEC networks that fuels much of the need for dedicated transport. There are many central offices where the traffic volume may not warrant the cost of collocation. The Commission has noted

²²⁵ See, e.g., RCN Comments in CC Docket No. 96-98, Declaration of Joseph Kahl, ¶ 18 (filed June 11, 2001) (special access could increase costs by factor of 5); WorldCom Comments in CC Docket No. 96-98, Exhibit G (filed June 11, 2001) (special access could increase costs by up to 397%); AES Communications Comments in CC Docket No. 96-98, Exhibit 1 (filed June 11, 2001) (special access could increase costs by over 700%).

that “collocating in each end office imposes materially greater costs on requesting carriers than would the purchase of the incumbent’s interoffice transport facilities.”²²⁶ The Commission noted that a CLEC will face non-recurring charges that range from \$15,000 to \$508,000 to provision physical collocation arrangements in a central office.²²⁷ This would be on top of the equipment that the CLEC would have to deploy in the arrangement such as fiber distribution panels, optical terminating equipment, multiplexers, digital cross connects, test access equipment, digital loop carrier equipment, power distribution panels, and cable racks.²²⁸ Requiring CLECs to collocate in every central office to get TELRIC prices for dedicated transport would eviscerate the benefits of unbundling dedicated transport. Unbundling dedicated transport enables CLECs to offer service to those customers served by those central offices. ILECs should be precluded from imposing unnecessary and unwarranted requirements that would impede CLEC access to dedicated transport. It is also important that the Commission specify that all interconnection transport be rated at the UNE dedicated transport rate so that ILECs will not attempt to impose a collocation requirement on facilities used for interconnection transport. In New York such an approach is used.²²⁹

3. Shared Transport Should Remain a UNE

The Commission defined shared transport as “transmission facilities shared by more than one carrier including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches in the incumbent LEC’s

²²⁶ *UNE Remand Order* at ¶ 357.

²²⁷ *Id.*

²²⁸ *Id.* at ¶¶ 356-357, n. 702.

²²⁹ *See Verizon PSC Tariff No. 8.*

network.”²³⁰ Carriers that will be using shared transport are those that purchase unbundled switching from the ILEC.²³¹ The Commission noted that the same cost and availability concerns that are present with dedicated transport arise with shared transport. The same lack of ubiquitous transport alternatives pertains in the shared transport context as with dedicated transport. Thus, carriers will need to either self-provision transport facilities or purchase dedicated transport facilities from the ILEC.²³² As the Commission, noted, however carriers may not have enough traffic to justify dedicated transport facilities, and need access to shared transport to efficiently and effectively manage their traffic. Purchasing only the increments of capacity needed to meet their traffic needs will allow certain CLECs to avoid the significant up-front costs of dedicated transport and also eliminate inefficient use of dedicated transport facilities.²³³ Allowing access to shared transport allows CLECs to handle traffic at peak loads and maintain call blockage levels at parity with those of the ILECs without having to purchase excess capacity.²³⁴ As the Commission has noted, “the relative costs of dedicated transport, including the associated NRCs, is an unnecessary barrier to entry for competing carriers.”²³⁵ Since the underlying reality of the transport market has not changed since the *UNE Remand Order*, and since dedicated transport still remains an expensive and inefficient option for many CLECs, the Commission should continue to require that shared transport remain an unbundled network element.

²³⁰ *UNE Remand Order* at ¶ 370.

²³¹ *Id.* at ¶ 369, n. 731.

²³² *Id.* at ¶ 375.

²³³ *Id.* at ¶ 376.

²³⁴ *Id.* at ¶ 378.

²³⁵ *Id.*

E. Local Switching

In the *UNE Remand Order*, the Commission found that local circuit switching meets the “impair” standard set forth in section 251(d)(2), finding that “lack of access to unbundled local switching materially raises entry costs, delays broad-based entry, and limits the scope and quality of the new entrant’s service offerings.”²³⁶ In reaching this conclusion, the Commission considered the availability of alternative sources of local switching outside the ILEC’s network and found that requesting carriers generally can not obtain switching from carriers other than the ILEC.²³⁷ The Commission concluded that requesting carriers are impaired in their ability to provide service in most markets because the total costs of self-provisioning switching impose on the requesting carrier a significant cost disadvantage relative to the ILEC.²³⁸

However, the Commission found that an exception to the general obligation to provide unbundled access to local switching was required in certain market circumstances.²³⁹ Specifically, the Commission determined that if the ILEC provides non-discriminatory access at cost-based rates to an enhanced extended link (“EEL”) that would connect the customer’s loop from the end office serving that customer to a different end office where the competitor is already collocated, the ILEC is not required to provide unbundled local switching to requesting

²³⁶ *UNE Remand Order*, 15 FCC Rcd at 3808, ¶ 253.

²³⁷ *Id.* at 3808-10, ¶¶ 253-55.

²³⁸ *Id.* at 3812, ¶ 259. The Commission found that, unlike the ILEC’s which retain material scale advantages with regard to provisioning and operating local circuit switches, requesting carriers incur higher cost due to their inability to realize economies of scale using circuit switching equipment. *Id.* at 3813, ¶ 260. The Commission also found that requesting carriers have not gained sufficient market share to generate switch utilization rates and economies of scale comparable to the ILECs, particularly to serve the mass market. *Id.* The Commission found the utilizing unbundled local circuit switching is likely to mitigate this barrier to early-stage entry and “is consistent with Congress’ intention that requesting carriers use unbundled network elements as a transitional market entry strategy.” *Id.* at 3814-15, ¶ 261.

²³⁹ *Id.* at 3808-09, ¶ 253.

carriers to serve end users with four or more lines within density zone 1 of the top 50 metropolitan statistical areas (“MSAs”).²⁴⁰ The Commission found that in such offices, CLECs have deployed switches to serve medium and large business customers, and that as a result, requesting carriers are not impaired without lack of access to the local switching for such customers provided that the EEL is available.²⁴¹

Commenters strongly urge the Commission to retain the availability of the EEL as a condition of the current or any expanded switching carve-out. The Commission properly found that the EEL diminishes the costs of collocation because the EEL allows requesting carriers to aggregate loops at fewer collocation locations and to increase their efficiencies by transporting aggregated loops over efficient high-capacity facilities to their central office location.²⁴² Without the EEL, the costs of collocation and coordinated loop cut-overs would materially raise entry costs for requesting carriers and impose material delays upon CLECs that offer service using self-provisioned switches. These additional costs, in turn, would limit the availability of funds that requesting carriers could invest in constructing new switching facilities, a result that would run counter to the goals of the Act. The Commission should therefore retain the requirement that ILECs make the EEL available as a condition of the switching carve-out whether this carve-out is retained or expanded.

While Commenters strongly support retaining the EEL as a condition of the switching carve-out, they also urge the Commission to reconsider its reliance on density zones to determine

²⁴⁰ *Id.* at 3823-31, ¶¶ 278-298.

²⁴¹ *Id.*

²⁴² *Id.* at 3828, ¶ 288.

when the ILECs must provide unbundled switching. The record upon which the Commission based its decision to relieve ILECs from the requirement to unbundle switching in density zone 1, within the top 50 MSAs, was comprised of data provided by a single ILEC.²⁴³ Given the limited evidence in the record, “drawing a line at density zone 1” does not represent “a reasonable approximation of where requesting carriers have deployed switches in density zone 1.” Moreover, ILECs employ varying methodologies to set zone boundaries.²⁴⁴ Density zone 1 in one state may have no resemblance to density zone 1 in another state because the ILECs have sweeping discretion to define zone boundaries. Relying upon density zones to implement unbundled local switching therefore creates artificial distinctions that may fail to exclude areas that are already served by competitors’ switches. For these reasons, limiting the availability of switching based on zone density 1 is arbitrary. Commenters urge the Commission to consider other alternatives for fashioning limits on the availability of unbundling switching.

F. OSS Must Remain as a UNE

In the record leading up to the *UNE Remand Order*, there was no dispute that access to ILEC operations support systems (“OSS”) should be provided on an unbundled basis.²⁴⁵ The only debate was over the parameters of such access. Nothing has transpired since the *UNE Remand Order* that lessens the importance of OSS to CLECs. OSS provides the gateway to the

²⁴³ BellSouth alone provided data describing where requesting carriers have deployed switches in density zone 1. *UNE Remand Order*, 15 FCC Rcd at 3826, ¶ 285. The record did not contain similar data for other ILECs. *Id.*

²⁴⁴ See Comments of Intermedia Communications, Inc. to *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* in CC Docket No. 96-98, at 16 (filed Feb. 17, 2000); Letter from Chuck Goldfarb, Director, Law and Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 and CC Docket No. 95-185, at 5-7 (filed Aug. 9, 1999).

²⁴⁵ *UNE Remand Order* at ¶ 423.

UNEs that are being addressed in this proceeding. It is for this reason that OSS is frequently the focus of Section 271 evaluations and apparently the most difficult of the checklist items for BOCs to meet, which highlights the necessity for nondiscriminatory access to OSS as a precondition to competition.²⁴⁶ As the Commission noted:

OSS is a precondition to accessing other network elements and resold services because competitors must utilize the incumbent LEC's OSS to order all network elements and resold services. Thus, the success of local competition depends on the availability of access to the incumbent LEC's OSS.²⁴⁷

In the *UNE Remand Order*, the Commission concluded that CLECs would be impaired without unbundled access to OSS.²⁴⁸ The same reality holds true today. The Commission recognized the possibility of the development of a competitive market for OSS, but noted that vendors could not provide a sufficient substitute "for the incumbent LEC's OSS because incumbent LECs have access to exclusive information and functionalities needed to provide service (e.g., customer service record information, provisioning of orders for unbundled network elements and resold services, ability to initiate repairs for unbundled network elements and resold services, etc.)."²⁴⁹ The fact that such an alternative market for OSS has not developed in 2002 underscores the continuing importance of access to the ILECs' OSS.

The ILECs still maintain control over access to this exclusive information and functionalities. CLECs providing service via resale or UNEs will still continue to be reliant on

²⁴⁶ See, e.g., Statement of Chairman Powell On Withdrawal of BellSouth 271 Application (December 20, 2001).

²⁴⁷ *UNE Remand Order* at ¶ 434.

²⁴⁸ *Id.* at 20934, ¶ 42.

²⁴⁹ *Id.*

the wealth of information and functionality that the ILEC possesses in regard to customers. In 1996, in its *Local Competition Order*, the Commission noted:

Much of the information maintained by these systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services. Without access to review, *inter alia*, available telephone numbers, service interval information, and maintenance histories, competing carriers would operate at a significant disadvantage with respect to the incumbent. Other information, such as the facilities and services assigned to a particular customer, is necessary to a competing carrier's ability to provision and offer competing services to incumbent LEC customers. Finally, if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition.²⁵⁰

This reality still holds true six years later. Access to OSS encompasses all aspects of the CLEC's relationship with its customers and potential customers. Pre-ordering information provides the information necessary to solicit a customer; ordering commences the transition of the customer to the CLEC; provisioning provides the means of migrating the customer; maintenance/repair addresses any service problems that may arise in the course of the relationship with the customer; and billing provides the means of remuneration for the services rendered. Diminished access at any one of these stages will impact and impair the CLEC's ability to compete.

It is vital that the Commission, at a minimum, maintain the level of access that it prescribed in the *UNE Remand Order*. CLECs have invested vast amounts of time and resources integrating with ILEC OSS and still have many operational issues and hurdles due to poor ILEC

²⁵⁰ *Local Competition Order* at ¶ 518.

provisioning of OSS. CLECs need to be assured that their access to ILEC OSS will not be diminished in any manner.

G. Line Sharing Must Remain As A UNE

In the *Line Sharing Order*, the Commission concluded that lack of access to the high frequency portion of the local loop materially diminishes the ability of CLECs to provide certain types of advanced services to residential and small business users, delays broad facilities-based market entry, and materially limits the scope and quality of competitor service offerings.²⁵¹ The Commission subsequently clarified that the line sharing requirement applies to the entire loop, including when the ILEC has deployed fiber in the loop.²⁵² The Commission also determined that CLECs must be able to access the high frequency portion of the loop at the central office as well as at remote terminals and that when a CLEC has collocated a DSLAM at a remote terminal the ILEC must enable the CLEC to transmit its traffic from the remote terminal to the central office either through access to dark fiber or by some other means.²⁵³ In addition, the Commission clarified that the line sharing obligation requires the ILEC to permit “line splitting.”²⁵⁴

²⁵¹ *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, 20916, ¶ 5 (1999) (“*Line Sharing Order*”). The FCC defined the high frequency spectrum network element to be the frequency range above voiceband on a copper loop facility used to carry analog circuit-switched voiceband transmissions. *Id.* at 20926, ¶ 26. “Line sharing” permits CLECs to use a customer’s existing telephone line to provide advanced services, including digital subscriber line (“DSL”) services, while the ILEC continues to use the same line to provide voice service.

²⁵² *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101, 2103, 2106, ¶¶ 2, 10 (2001) (“*Line Sharing Recon. Order*”).

²⁵³ *Id.* at 2106-07, ¶¶ 10-12.

²⁵⁴ *Id.* at 2110, ¶ 18.

In reaching these conclusions, the Commission considered actual market activity and the availability of alternatives in the marketplace outside the ILEC's network.²⁵⁵ Because CLECs seeking to offer DSL services to customers subscribing to the ILEC's voice service cannot deploy their DSL services with the same efficiency or at the same cost that ILECs enjoy, the Commission concluded that the ILECs' refusal to permit line sharing materially diminishes the CLECs' ability to offer DSL services to residential and small business customers.²⁵⁶

The Commission also found that the alternatives in the marketplace to be either significantly more costly or not available ubiquitously, or both.²⁵⁷ The Commission found, moreover, that competitive carriers are at a competitive marketing disadvantage and that providing CLECs with access to the high frequency portion of the loop would remove the "additional burden from consumers that prefer to obtain xDSL services from competitors."²⁵⁸

Having examined actual market activity and considered the availability of alternatives in the marketplace, the Commission properly applied the "impair" standard of section 251(d)(2) and correctly concluded that the CLECs' ability to provide above-voice services would be "impaired" without unbundled access to the high frequency portion of the loop. The

²⁵⁵ *Line Sharing Order*, 14 FCC Rcd at 20929, ¶ 32. The Commission found that most DSL lines have been deployed to residential or small business consumers and that ILECs provide service on the vast majority of these lines where their DSL-based service shares the same line with their voice service. *Id.* The record also reflected that competitive carriers, in contrast, generally are not providing voice-compatible DSL services to these classes of customers. *Id.*

²⁵⁶ *Id.* at 20929-30, ¶ 33.

²⁵⁷ *Id.* at 20931, ¶ 36. Self-provisioning loops is not a viable alternative because replicating the ILEC's vast and ubiquitous network would be prohibitively expensive. *Id.* ¶ 37. In addition, purchasing or self-provisioning a second loop from the ILEC is not possible because such loops are not ubiquitously available and even where such loops are available, providing DSL service over a second loop would be materially more costly and less efficient than purchasing the unbundled high frequency portion of the loop. *Id.* at 20931-34, ¶¶ 38-41.

²⁵⁸ *Id.* at 20934, ¶ 42.

Commission's analysis continues to be sound because no material changes have occurred in the marketplace since the Commission completed its analysis in *the Line Sharing Order* and the *Line Sharing Reconsideration Order* that would warrant elimination of this network element as a UNE. Commenters therefore submit that the Commission must continue to require unbundled access to the high frequency portion of the loop because the lack of such access will materially diminish competitors' ability to provide the above-voice services they seek to offer.

H. "Next Generation" Network Elements Must Be Made Available As UNEs

The Commission previously has inquired whether, and the extent to which, ILECs should be required to unbundle "next generation" network elements.²⁵⁹ The Commission has developed a full record on the issue and has incorporated that record into this proceeding.²⁶⁰ The Commission should adopt the CLECs' proposals on the record regarding the unbundling of "next generation" network elements. Specifically, the Commission should establish that the ILECs' obligations to offer UNEs fully applies to new optical loops and network facilities, including, at a minimum, optical wavelengths, virtual paths between the ILECs' central offices and customer premises, channelized fiber UNEs based on time division multiplexing, broadband fiber, and "next generation" digital loop carrier ("NGDLC") aggregation network elements. Commenters in previous proceedings have established a substantial record that supports the conclusion that

²⁵⁹ See *Line Sharing Recon. Order*, 16 FCC Rcd 2101 (2001). See also *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297, 15 FCC Rcd 17806 (Aug. 10, 2000) ("*Advanced Services Recon. Order and NPRM*").

²⁶⁰ *NPRM* at 7, ¶ 11.

the ILECs' UNE obligations should fully apply to such new optical loops, network facilities and "next generation" network elements.²⁶¹

The Commission should require the unbundling of next generation network elements because CLECs would be impaired in their ability to provide the services they seek to offer in the absence of access to such next generation network elements. Specifically, as discussed access to high capacity loops and transport, including lit and dark fiber loops and transport, is not otherwise available to CLECs from other sources, and there is no realistically available alternative. Thus, the absence of unbundled end-to-end access to the ILEC next generation loop network architecture would materially diminish a requesting carrier's ability to provide service.

Commenters urge the Commission to establish UNE requirements to provide CLECs with unbundled access to all next generation network loop architectures and full access to LEC-deployed advanced technologies. Unbundled access to such next generation network loop architectures and LEC-deployed technologies should provide CLECs with unbundled end-to-end access from the central office to the customer, regardless of the intervening loop makeup, and should permit access to the entire path of the fiber loop on the same basis the ILEC provides access to itself.²⁶²

²⁶¹ See, e.g., comments of Mpower Communications Corp. to *Advanced Services Recon. Order and NPRM* in CC Docket Nos. 98-147 and 96-98, at 47-54 (Oct. 12, 2000).

²⁶² See, e.g., February 27, 2001 comments of Mpower at i. Collocating the equipment necessary to perform DSLAM and multiplexing functions along with optical electronics in every ILEC remote terminal served by fiber, making all the necessary cross connections at the remote terminal between the end user's copper and its collocated equipment, and leasing dark fiber (assuming dark fiber is even available) from an ILEC to each remote terminal and to connect the dark fiber to the CLEC's collocated optical equipment, would *not* constitute a realistic alternative to end-to-end unbundled access to ILEC next generation loop networks. Given the attendant enormous cost, inherent delays, lack of quality, lack of ubiquity, and negative impact on network operations that would result from leasing dark fiber and collocating in each remote terminal, the Commission should determine that absence of unbundled access to the ILEC next generation loop network architecture would materially diminish a requesting carrier's ability

Commenters also agree with comments filed by ALTS that the Commission should not backtrack on its policy decision in the *Line Sharing Reconsideration Order* to require line sharing over loops served through a fiber fed NGDLC at a remote terminal,²⁶³ given that, as aptly stated by AT&T in its comments, “the ILECs’ monopoly control over local loops gives them the incentive and the unique opportunity to use new advances in new loop technology as leverage to shut down competition for *all* local telecommunications services, both voice and advanced services alike.”²⁶⁴

Commenters submit that the record established to date supports the unbundling of new optical loops and network facilities, including NGDLC loops.

Commenters stress that adopting an approach to implementation of unbundled access to network elements for next generation networks based on no more than that they are broadband capable, would violate the Commission’s frequently stated goal of technology neutrality in decision making.²⁶⁵ The Commission has heretofore wisely recognized the pitfalls of attempting to fashion regulations implementing the pro-competitive goals of the 1996 Act based on a

to provide service. See Comments of Mpower to *Line Sharing Recon. Order and FNPRM* in CC Docket Nos. 98-147 and 96-98, at Attachment B (Feb. 27, 2001).

²⁶³ See Reply Comments of the Association for Local Telecommunications Services (ALTS) to the *Line Sharing Recon. Order and FNPRM* in CC Docket Nos. 98-147 and 96-98, at 2-12 (March 13, 2001).

²⁶⁴ *Id.*, at 3, quoting comments of AT&T to the *Line Sharing Recon. Order and FNPRM* in CC Docket Nos. 98-147 and 96-98, at 4.

²⁶⁵ See, e.g., *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and NPRM in CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91 (“*Advanced Services Memorandum Opinion and Order*”), FCC 98-188, 13 FCC Rcd 24011, at 24017, ¶ 11 (1998) (“Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets.”); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, at ¶ 2 (1999) (“Central to Congress’ goal of widespread deployment of advanced services is section 251 of the 1996 Act. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets.”); *Federal State Joint Board on*

particular type of technology.²⁶⁶ Thus, the Commission has recognized that the marketplace is better qualified than government in most cases to pick and choose technologies and that enshrining technology choices in government regulations is likely to stall innovation.²⁶⁷ Fashioning pro-competitive regulations based on technology also provides an opportunity for regulated entities to manipulate compliance by choice of technology.

These concerns should fully govern the Commission's approach towards unbundling of next generation networks. Fashioning an exclusion from unbundling obligations based a particular level of technology; would permit ILECs to avoid unbundling requirements by manipulating their networks and transitioning services, including voice offerings, to their next generation platforms. Moreover, next generation high capacity loops and transport facilities are being tightly integrated with the current ILEC networks in an incremental process, as the

Universal Service, Report and Order in CC Docket No. 96-45, 12 FCC Rcd. 8776, 8802-8803 (stressing the importance of technological neutrality to promote competition).

²⁶⁶ See, e.g. *Advanced Services Memorandum Opinion and Order*, 13 FCC Rcd at 24012, 24014, ¶ 2 ("The role of the Commission is not to pick winners or losers, or select the "best" technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.") See also *UNE Remand Order*, 15 FCC Rcd 3696, at ¶ 234 (in defining network interface device ("NID") in the *UNE Remand Order*, the Commission recognized that the "evolution in network design and technology will likely cause additional design variations among the hardware interfaces between carrier and customer premises facilities. Accordingly, we define the NID broadly to ensure that competitors will be able to obtain access to any of these facilities as an unbundled network element. Our intention is to ensure that the NID definition will apply to new technologies, as well as current technologies, and to ensure that competitors will continue to be able to access customer premises facilities as an unbundled network element, as long as that access is required pursuant to section 251(d)(2) standards.")

²⁶⁷ See, e.g. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order in CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, FCC 01-204, 16 FCC Rcd 15435, ¶ 7 (2001) ("Indeed, we have previously recognized that, in adopting the 1996 Act, Congress consciously did not try to pick winners or losers, or favor one technology over another. Rather, Congress set up a framework from which competition could develop, one that attempted to place incumbents and competitors on generally equal footing, so that each could share the efficiencies of an already ubiquitously-deployed local infrastructure while retaining independent incentives to deploy new, innovative technologies and alternative infrastructure.")

Commission has already recognized.²⁶⁸ In a few years, given current trends, the local exchange network will be a converged broadband network of packet switches and fiber optics used to provide both voice and data services.²⁶⁹ Thus, it is not now, and will not be, practical or feasible to fashion a separate approach to unbundling of next generation networks because there is, and will be, only one integrated ILEC network. Limiting unbundling obligations for next generation technology, merely because it is an advanced technology, would encourage ILECs to build separate networks (assuming there was a market for them), even though this would be less efficient, in order to relegate CLECs to antiquated copper and thwart broadband competition.

The Commission should keep in mind that Congress explicitly chose to establish a technology neutral definition of “advanced telecommunications capability.” Thus, that term is explicitly “defined, without regard to any transmission technology or media”²⁷⁰ Moreover, the Commission has determined that UNEs may be used to provide any telecommunications service.²⁷¹ Therefore, it would be unlawful for the Commission to adopt a different approach to unbundling based merely on type, or capability, of technology deployed. Instead, as described in these comments, the Commission may limit ILEC unbundling obligations to next generation networks only if CLECs would not be impaired.

²⁶⁸ See *Broadband NPRM* at ¶ 12.

²⁶⁹ See *The Local Exchange Network in 2015*, Lawrence K. Vanston, Ph.D., Technology Futures, Inc., 2001.

²⁷⁰ Section 706(c)(1) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157 (47 U.S.C. § 157).

²⁷¹ See *Local Competition Order*, 11 FCC Rcd 15499, 15679, ¶ 356; *UNE Remand Order*, 15 FCC Rcd 3696 at ¶ 484; *Line Sharing Recon. Order*, 16 FCC Rcd 2101, at ¶ 18.

I. Signaling Networks and Call-Related Databases Must Remain Available As UNE

The Commission has previously concluded that unbundled access to signaling networks and call-related databases is essential to effective interconnection of ILEC and CLEC networks and critical to entry in the local exchange market.²⁷² In enacting the 1996 Act, Congress expressly contemplated the unbundling of signaling systems and call-related databases as network elements.²⁷³ The Commission should still require unbundled access to signaling networks and call-related databases.

1. Signaling Networks

The Commission determined that current local switching technology requires each local switch to connect to a signaling transfer point (“STP”).²⁷⁴ There was no dispute, even from the ILECs, that a CLEC purchasing unbundled switching from the ILEC, must have unbundled access to signaling and STPs because ILEC switching networks are already connected to a STP.²⁷⁵ The only issue was what type of access a CLEC that does not purchase unbundled switching should have. The Commission held that regardless of whether the CLEC purchases unbundled switching it should have unbundled access to the ILEC’s signaling network.²⁷⁶ The Commission determined that lack of unbundled access “degrades the quality of the CLEC’s service to its end users and materially restricts its ability to provide service on an ubiquitous

²⁷² *UNE Remand Order* at ¶¶ 383, 402; *Local Competition Order* at ¶ 478.

²⁷³ CC Docket No. 96-98, Comments of the Association for Local Telecommunications Services at 58 (May 26, 1999), citing, *Local Competition Order* at ¶¶ 478-479.

²⁷⁴ *UNE Remand Order* at ¶ 386.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at ¶ 388.

basis.”²⁷⁷ The Commission required ILECs to provide CLECs who have deployed their own switching facilities unbundled access to the ILEC’s switching network for each of the CLEC’s switches.²⁷⁸

The Commission noted that while there were third-party providers of signaling networks, none of the providers could match the ubiquity of the ILEC signaling networks.²⁷⁹ In fact, third-party providers only have a few geographically dispersed STPs.²⁸⁰ Thus, if a CLEC used an alternative provider, more of its switches would be dependent on a single STP. If that STP experienced an outage, much of the CLEC network would be affected.²⁸¹ In contrast, RBOCs have deployed at least one STP in every LATA.²⁸² Thus, even if there is an outage, only a limited part of their networks are affected. In addition, the alternative sources of signaling are not capable of delivering service without a material loss in quality.²⁸³ There is nothing to indicate that CLECs have found a more ubiquitous and more reliable alternative in signaling networks in the intervening three years.

Moreover, regardless of whether a CLEC purchases unbundled switching, CLECs will be impaired without unbundled access to the ILECs’ signaling networks. Access to the SS7 network via the STP is necessary for the exchange of traffic. The ILEC has a single signaling network to move SS7 messages between the multiple switches on its network for call routing and

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at ¶ 394.

²⁸⁰ *Id.* at ¶ 394.

²⁸¹ *Id.* at ¶ 395.

²⁸² *Id.*

for various features. The only way for a CLEC to set up and complete a call with a SS7-based ILEC switch is via this network. Likewise, alternative SS7 providers must also access the ILEC network via these same ILEC STPs. Given the inability of alternative SS7 providers to match the ubiquity of the ILEC network the alternative providers do not provide a functional substitute to CLECs. Alternative providers may provide a means for CLECs to establish a single SS7 link to multiple ILECs and for access to call-related databases, but even this is not an adequate substitute for a CLEC that is willing to interconnect at the ILEC STP in each LATA. A CLEC is likely to use both direct SS7 connections to the ILECs and alternative providers. The links to the ILEC STP will be used for local call completion. The links to the ILEC STPs, as noted above, are crucial for local call completion. The links to hub providers may be used for access to call-related databases or to provide overflow back-up to the local links. The links to hub providers, however, must traverse much longer distances and the greater distances provide a greater risk of failure.

For purposes of network reliability, the Commission must reiterate that the CLECs have a right to interconnect with ILECs directly at the ILEC STP. The Commission should not require CLECs to route all SS7 signaling through alternative providers. The Commission should not take any action that will undermine the CLEC's ability to interconnect directly with the ILEC STPs where the CLEC chooses to do so. Thus, the Commission should maintain unbundled access to signaling networks.

²⁸³ Comments of the Association for Local Telecommunications Services in CC Docket No. 96-98, at 58 (May 26, 1999).

2. Call-Related Databases

The Commission also ordered unbundled access to call-related databases including, among other things, access to the Line Information database (“LIDB”) and the Calling Name database (“CNAM”).²⁸⁴ The Commission found that there are no alternatives of comparable quality and ubiquity available to requesting carriers for the ILEC call-related databases.²⁸⁵ The Commission required ILECs to provide physical access at the STP linked to the unbundled databases.²⁸⁶ The Commission determined that such access encourages efficient network architecture deployment, promotes the ability of competitors to provide service, and is critical to permitting the seamless routing and completion of traffic both among competitors and between competitors and the ILEC.²⁸⁷ For instance, ILECs are the only providers of CNAM database information.²⁸⁸ Thus, for a switch-based competitor to provide Caller ID to a customer it must have access to the CNAM database.²⁸⁹ The Commission should also require ILECs to file TELRIC-based CNAM query rates for CNAM queries associated with out of state calls. There simply are no substitutes for the ILEC databases, and the Commission must continue to mandate unbundled access to these databases.

J. Unbundled Access to Operator Services and Directory Assistance

RCN requests that the Commission reestablish operator services and directory assistance as a UNE. In the *Local Competition Order*, the Commission determined that ILECs should

²⁸⁴ *UNE Remand Order* at ¶ 403.

²⁸⁵ *Id.* at ¶ 410.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at ¶ 411.

²⁸⁸ *Id.* at ¶ 416.

provide unbundled access to their operator service and directory assistance systems.²⁹⁰ In particular the Commission held:

We find that the databases used in the provision of both operator call completion services and directory assistance must be unbundled by incumbent LECs upon a request for access by a competing provider. In particular, the directory assistance database must be unbundled for access by requesting carriers. Such access must include both entry of the requesting carrier's customer information into the database, and the ability to read such a database, so as to enable requesting carriers to provide operator services and directory assistance concerning incumbent LEC customer information.²⁹¹

The Commission stated that “we find that unbundling both the facilities and functionalities providing operator services and directory assistance as separate network elements will be beneficial to competition and will aid the ability of competing providers to differentiate their service from the incumbent LECs.”²⁹² The Supreme Court expressly affirmed that the Commission’s designation of operator services and directory assistance as a network element was an “eminently reasonable” interpretation of the 1996 Act.²⁹³

The Commission, in the *UNE Remand Order*, however, removed OS/DA from the UNE list.²⁹⁴ The Commission found significant evidence of a wholesale market for OS/DA, and that there were opportunities for self-provisioning of OS/DA.²⁹⁵ The Commission determined that the Section 251(b)(3) requirement of nondiscriminatory access to incumbent’s underlying

²⁸⁹ *Id.*

²⁹⁰ *Local Competition Order* at ¶ 539.

²⁹¹ *Id.* at ¶ 538.

²⁹² *Id.* at ¶ 536.

²⁹³ *UNE Remand Order* at ¶ 438, citing, *Iowa Utilities Board*, 119 S.Ct. at 733-34.

²⁹⁴ *UNE Remand Order* at ¶ 441.

²⁹⁵ *Id.*

databases used in the provision of OS/DA coupled with evidence of multiple alternative providers showed that CLECs would not be impaired without unbundled access to OS/DA.²⁹⁶

The Commission focused on the availability of alternative OS/DA services without addressing the issue of how the viability of such alternative services are dependent on unbundled access to OS/DA databases. A CLEC can provide a viable alternative OS/DA service if it has unbundled access to the bulk listings in the ILEC OS/DA databases. RCN believes that it is not enough, however, that they have nondiscriminatory access to said databases. As WorldCom has observed, “the obligation of all local exchange carriers under section 251(b)(3) to provide nondiscriminatory access is less stringent than the obligation of incumbent local exchange carriers under sections 251(c)(3) and 252(d)(1) to provide access to unbundled network elements at cost-based rates.”²⁹⁷ A prerequisite for CLECs providing their own comparable OS/DA platform or using an alternative OS/DA platform is that they have the same access to the bulk listing information as the ILECs enjoy. This allows CLECs to curtail their dependence on individual database dips into the ILEC databases.²⁹⁸ Only through unbundled access to the bulk listings at cost-based prices can a comparable OS/DA product be developed.

As the historic monopoly providers of local service, ILECs have the only unimpeded access to the customer information needed for OS/DA databases for over 96% of all customers.²⁹⁹ It is not enough that CLECs have nondiscriminatory access to those databases, because unless access to those databases is treated as an UNE, ILECs do not have to provide

²⁹⁶*Id.*

²⁹⁷CC Docket No. 96-98, Petition of MCI WorldCom, Inc. for Reconsideration at 18 (Feb. 17, 2000).

²⁹⁸*Id.* at 19.

²⁹⁹*Id.* at 18.

such access at cost-based prices. ILECs can also preclude access to the bulk listings and instead require CLECs to access the databases on a dip basis.³⁰⁰ Thus, CLECs face the choice of either paying artificially inflated prices for database access on a dip basis, or try to find alternative sources for the data. Since the ILEC possesses the most complete and accurate data,³⁰¹ if CLECs seek information from an alternative provider, CLECs will be getting an inferior product. The Commission recognized that alternative sources of OS/DA may provide inferior information to that which the ILEC possesses.³⁰² The Commission mistakenly thought, however, that this information asymmetry could be rectified through the nondiscriminatory access requirement. The Commission failed to recognize the possibility, that has become a reality, that the ILEC can price and frame access in such a way as to impede such access.³⁰³ If the CLEC wants a product at parity with the ILEC product it has to pay the inflated “market based” rates unilaterally set by the ILEC. In short, the market alternatives that the Commission felt CLECs have in regard to OS/DA are illusory. The nondiscrimination requirement is not sufficient for CLECs to be able to provide an OS/DA product at parity with the ILEC. The CLEC needs unbundled access at cost-based prices to the bulk listings in the ILEC databases to provide a comparable product.

CLECs are also impaired without access to the ILEC’s OS/DA platforms, particularly those CLECs that serve residential customers. ILECs enjoy economies of scale and scope in regard to their OS/DA platforms, particularly in the residential market, that CLECs would be

³⁰⁰*Id.* at 19.

³⁰¹*UNE Remand Order* at ¶ 457.

³⁰²*Id.*

³⁰³For instance, WorldCom chronicled how SWBT refused to make bulk listings available to WorldCom as an UNE and instead charged “market based” rates. *WorldCom Petition* at 19.

hard-pressed to duplicate either through self-provisioning or purchasing from alternative providers. ILECs have numerous in-region call centers that can provide more familiarity with the region and lower transport costs to the OS/DA platform. CLECs at best will have a few national call centers. This difference alone drastically impairs the quality of competitive OS/DA platforms vis-à-vis the ILEC's platforms. For instance, a person may very likely make a call to an operator and ask for local information. The ILEC can offer operator service that includes familiarity with the local area because the ILEC is itself local. The CLEC customer, however, would have its call routed to a national call center where the operator would most likely have no familiarity with the local area and be unable to answer the query. Likewise, a directory assistance call, which rides the same trunk group and is routed the same way as the operator assistance call, would provide the same quandary for the CLEC, and the same dissatisfaction for the CLEC customer. Accordingly, RCN believes that CLECs are impaired without unbundled access to OS/DA.

As noted above, ILECs already possess much lower transport costs, and they can seize upon their economies of scale and scope in regard to their call centers to provide OS/DA services at a much lower cost. Thus, it is essential that ILECs be required to provide OS/DA at technical parity to that which it provides itself. Otherwise, CLECs will be precluded from sharing the economies of scale and scope that ILECs enjoy in regard to OS/DA. Furthermore, ILECs can enjoy real-time updates to its database, while CLECs have to rely on the filtering down of such updates to its OS/DA platform or that of its alternative provider. Given the ever-changing listings in the residential market, this lack of real-time ability to update listings will impair CLECs in the residential market, because there is a greater risk that a customer will be given

outdated information. The CLEC customer will likely grow frustrated by this disparity in information and wrongly perceive that it is the fault of the CLEC. For the foregoing reasons, RCN requests that the Commission reinstate OS/DA as a UNE.

VI. GENERAL UNBUNDLING OBLIGATIONS

A. The Commission May Not Disregard the Nondiscrimination Obligation of Section 251(c)(3) In Order to Establish a “Meaningful Opportunity to Compete” Standard

In the *NPRM*, the Commission notes that it previously determined that the term “nondiscriminatory” in section 251 was intended by Congress to impose a more stringent standard for prohibiting discrimination than the “unjust and unreasonable” standard set forth in section 202 of the Act.³⁰⁴ The Commission goes on to point out that it has interpreted the terms “just” and “reasonable” in section 251 to require ILECs to provide requesting carriers with UNE access that provides “a meaningful opportunity to compete.”³⁰⁵ The Commission then notes that in prior orders it has required ILECs to provide all technically feasible methods of access to network elements.³⁰⁶ The Commission states that it now seeks comment on whether it should, “[a]s an alternative . . . identify and require only those methods of access that fulfill the ‘just, reasonable and nondiscriminatory’ standard of section 251(c)(3).”³⁰⁷

³⁰⁴ *NPRM* at 33-34, ¶ 68, citing *Local Competition First Report and Order*, 11 FCC Rcd at 15612, paras. 217-218. In the *Local Competition First Report and Order*, the Commission concluded that Congress’ intent in establishing a “nondiscrimination” standard in Section 251 was to impose a more stringent standard than the “unjust or unreasonable discrimination” standard in Section 202(a) of the Act. *Id.* at 15612, ¶ 217. Accordingly, in recognition that ILECs have the incentive to discriminate against competitors by providing them with less favorable terms and conditions of interconnection than they provide themselves, the Commission established that the term “nondiscriminatory,” as used throughout section 251, applies to the terms and conditions an ILEC imposes on third parties as well on itself. *Id.*

³⁰⁵ *Id.* at 24, ¶ 68, citing *Local Competition First Report and Order* 11 FCC Rcd at 15660, ¶ 315.

³⁰⁶ *NPRM* at 34, ¶ 68.

³⁰⁷ *Id.*

It is not entirely clear in the context of paragraph 68 of the *Triennial Review NPRM* what the Commission is proposing. If the Commission is inquiring as to whether it may ignore the statutory requirement in section 251(c)(3) that ILECs provide access to UNEs “at any technically feasible point,” and instead apply a “meaningful opportunity to compete” standard, Commenters submit that this would be contrary to the black letter of the Act. Similarly, to the extent the Commission is inquiring as to whether it may simply choose to enforce a “just and reasonable” standard that is limited to a “meaningful opportunity to compete” inquiry, and ignore the non-discrimination standard set forth in section 251, Commenters submit that this clearly would be unlawful under the Act.

Pursuant to Section 251(c)(3) of the Act, ILECs must provide nondiscriminatory access to unbundled network elements at any technically feasible point “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”³⁰⁸ Moreover, as the Commission has reiterated previously, the “just” and “reasonable” requirements under section 251(c)(3) are *in addition to* the statutory nondiscrimination obligation.³⁰⁹ The Commission may not disregard the

³⁰⁸ 47 U.S.C. § 251(c)(3). In the Local Competition proceeding, the Commission previously established minimum national standards for just, reasonable, and nondiscriminatory terms and conditions of interconnection, in order to “offset the imbalance in bargaining power between incumbent LECs and competitors and encourage fair agreements in the marketplace between parties by setting minimum requirements that new entrants are guaranteed in arbitrations.” *Local Competition First Report and Order*, 11 FCC Rcd at 15611, ¶ 216.

³⁰⁹ The Commission has determined that the ILECs’ duty to provide UNEs pursuant to section 251 encompasses *more* than the obligation to treat carriers equally, as ILECs also are required pursuant to section 251 to provide UNEs on terms and conditions that are “just” and “reasonable.” *Local Competition First Report and Order*, at 15660, ¶ 315. The Commission determined that the terms “just” and “reasonable” in the context of section 251(c)(3) require ILECs to provide UNEs under terms and conditions that will provide efficient competitors with a “meaningful opportunity to compete,” and that such “terms and conditions should serve to promote fair and efficient competition.” For example, the Commission found that the terms “just” and “reasonable” in the context of section 251(c)(3) mean that ILECs may not provision UNEs that are inferior in quality to what the ILEC provides itself.

nondiscrimination obligation of section 251(c)(3) in order to establish a “meaningful opportunity to compete” standard.

B. The Commission Should Require ILECs to Provide a Combination of UNEs and Wholesale Services

The Commission seeks comment on “the relationship between ‘services,’ including both retail services and wholesale services (governed by sections 251(c)(4) and 251(b)(1)), and ‘network elements’ (governed by sections 251(d)(2) and 251(c)(3)).”³¹⁰ Specifically, the Commission seeks comment on whether the Act requires ILECs to provide a combination of network elements and services. The Commission also seeks comment generally on the rights and obligations of all carriers regarding the use and provision of services and network elements, particularly when combined over the same facilities or when used in combination to serve a specific customer or class of customers.

Commenters submit that ILECs are required under the Act to provide requesting carriers a combination of UNEs and wholesale services, whether combined over the same facilities or used in combination to serve a specific customer or class of customers. In enacting the 1996 Act, Congress intended to maximize the means by which CLECs could enter the local market, whether through UNEs, resale or a combination of these methods. It is consistent with the purpose and goals of the Act to interpret sections 251(c) (3) and 251(c)(4) to provide carriers with the full range of options to develop innovative service offerings through a combination of UNEs and ILEC wholesale services.

³¹⁰ *NPRM* at 34, ¶ 69.

The ILECs' duty to provide UNEs pursuant to section 251(c)(3) and their duty to provide wholesale services for resale pursuant to section 251(c)(4) are not mutually exclusive, and nothing in the statute gives ILECs the option of providing to a requesting carrier only UNEs or resale services, but not both in combination. Section 251(c)(4) requires incumbent LECs to offer for resale at wholesale rates *any telecommunications service* that the carrier provides at retail to subscribers who are not telecommunications carriers.”³¹¹ In addition, pursuant to Section 251(c)(4), ILECs may not prohibit [or] impose unreasonable or discriminatory conditions or limitations on [resale].”³¹² Section 251(c)(3) requires ILECs to provide to any requesting carrier “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory,” and requires ILECs to provide UNEs “in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.”³¹³

The Commission has recognized that “the ability of ILECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by ILECs to preserve their market position.”³¹⁴ Accordingly, the Commission has long held that “resale restrictions are presumptively unreasonable.”³¹⁵ Moreover, the combination of UNEs and ILEC wholesale services is technically feasible. Accordingly, an ILECs' refusal to resell to a requesting carrier *any telecommunications service* that it provides at retail, because the

³¹¹ 47 U.S.C. § 251(c)(4) (emphasis added).

³¹² *Id.*

³¹³ 47 U.S.C. § 251(c)(3).

³¹⁴ *Local Competition First Report and Order*, 11 FCC Rcd. 15499, 15966, ¶ 939.

³¹⁵ *Id.*

requesting carrier already purchases UNEs and intends to use the resold service in combination with UNEs, would constitute an unreasonable limitation on resale. Similarly, an ILECs' refusal to provide UNEs to a requesting carrier that also chooses to purchase services for resale pursuant to Section 251(c)(4) would constitute an unreasonable condition on the requesting carrier's access to UNEs.

In light of the central purposes and goals of the Act, and given the absence of any statutory language specifying that ILECs have an option to provide either resale services or UNEs to requesting carriers, but not both in combination, the Commission should determine that ILECs are required under the Act to provide a combination of UNEs and wholesale services to a requesting carrier, whether combined over the same facilities or used in combination to serve a specific customer or class of customers.

C. ILECs Must Provision EELs to CLECs

In the *NPRM*, the Commission requests comment on whether the safe harbor provisions “in practice, are effectively tailoring access to EEL combinations” to carriers that provide a significant amount of local exchange service to their end users.³¹⁶ Commenters are also asked to state how many circuits eligible for conversion under the safe harbor provisions have actually been converted and whether the safe harbors appropriately target CLEC impairment to local exchange service.³¹⁷

³¹⁶ *NPRM* at ¶ 71.

³¹⁷ *Id.*

1. The FCC Must Enforce CLECs' Right to EEL Conversions

Commenters recognize the Commission's apparent desire to ensure that the EEL is not used to circumvent the current access regime, and ALTS is on record in support of narrowly tailored use restrictions.³¹⁸ The FCC, however, must not tolerate the recurring misinterpretations of the *Supplemental Clarification Order* that have allowed the ILECs to complicate, limit, even preclude the use of EELs by CLECs to provide local service. The limited use restrictions were designed to protect ILECs from precipitous reductions in special access revenues for the transport of switched interexchange voice traffic, not to permanently insulate a particular ILEC customer base from future competition. In direct contravention of the *FCC's Supplemental Clarification Order*, the ILECs have used the narrowly tailored use restrictions, along with misapplication of the auditing process and outright denials of CLEC self-certifications, to deny EELs to CLECs. The result has been largely to preclude use of EELs by CLECs, forcing CLECs to overpay for special access and insulating consumers from competitive alternatives. The misinterpretations of the FCC's temporary use restrictions have severely constrained CLECs' abilities to utilize EELs under most circumstances. At bottom, the ILECs have engaged in regulatory gamesmanship, legal "hair-splitting," and false allegations of "CLEC misinterpretation" as a means of preventing CLECs from using EELs to provide competitive local services to consumers. The ILECs have so seriously misconstrued

³¹⁸ ALTS ex parte letter, CC Docket 96-98 (filed Mar. 24, 2000).

and otherwise taken advantage of the temporary restrictions necessary to achieve the Commission's stated policy goals, that EELs are largely unavailable to CLECs.³¹⁹

CLECs have unfortunately become collateral damage in the special access/EEL battle being waged between ILECs and IXCs. No one, not even the ILECs, has argued that CLECs should be denied access to EELs. Unfortunately, due to the ILECs' desire to preclude IXCs from converting massive amounts of special access circuits to EELs, CLECs have also been denied EELs. CLECs have grown increasingly frustrated by ILEC intransigence in converting special access circuits to EELs. CLECs had been led to believe that the ILECs had assured the FCC, during the course of the establishment of the EEL use restrictions, that the ILECs would readily convert EELs for CLECs, and only needed some restrictions to ensure that IXCs could not convert massive amounts of special access to EELs, causing immediate, dramatic reductions in ILEC special access revenue. The FCC bent over backwards to accommodate the ILECs' concerns in large part because the ILECs promised that once safeguards were in place, they would readily convert access facilities. The ILECs, however, have failed to live up to their promises to provide CLECs with timely and cost-effective EEL conversions.

It is critical to the success of competition that CLECs -- be they providers of voice and/or data services -- have ready access to UNEs and UNE combinations at forward-looking incremental cost pricing. The absurdity is that, while FCC and state rules require ILECs to provision UNEs in a timely and cost-effective manner, CLECs typically order UNE equivalent

³¹⁹ Some CLECs have noted that existing state EEL provisioning rules, as well as the ILEC obligation to provision EELs in lieu of providing unbundled switching, has allowed for some positive experiences for CLECs. Conversely, in the absence of these rules, EELs have been largely unavailable.

services (*e.g.*, DS-1 loops and transport) at tariffed rates, due to ILEC refusal to provision such facilities as UNEs. ILEC refusal to allow CLECs to obtain timely and cost-effective access to the incumbent networks (*e.g.*, loops, loops + muxing, loops + transport), has, in fact, undermined competition. It is absolutely essential that the FCC send a clear signal to the industry that ILEC foot-dragging, gamesmanship and intransigence will no longer be tolerated.

Within the context of the EEL conversion process, it is essential that the FCC afford the CLECs the tools they need to obtain EELs in a timely and cost-effective manner. In order for CLECs to make effective use of EELs to deploy competitive services and technologies, the FCC must eliminate widespread delays and restrictions on EEL conversions. CLECs should only be charged the UNE rate for a facility 10 days after it delivers written notification to the ILEC of its desire to convert an access circuit to an EEL. This billing change should apply regardless of when the ILEC actually completes the conversion. ILECs must not be allowed to establish “pre-audit” or other criteria that is inconsistent with or more burdensome than the FCC’s determination that a letter self-certifying that a carrier meets the FCC’s “significantly local standard” is sufficient. The ILEC must not be allowed to be the arbiter of “significantly local” – that determination remains with the regulatory authority. Until such time as the regulatory authority concludes that the CLEC’s services do not satisfy the “significantly local” standard, the CLEC’s self-certification must prevail.

The Commission must also clarify that the ILEC may not conclude that a circuit fails the “significantly local” test simply because a CLEC’s customer is using an EEL for data applications. The Commission must make explicit that ILECs must make EELs available for

data services. In the absence of such direction to the ILECs, requesting carriers will be denied the ability to provide innovative data services to consumers. Because the EEL architecture for data services is not materially different than for voice offerings, the Commission's clarification will impose no additional burden on incumbents.

Furthermore, the FCC should mandate that no termination liability charges are to be assessed to CLECs converting circuits to UNE pricing. Otherwise, the ILECs will be unjustly rewarded for years of intransigence in offering EELs, thus forcing CLECs to accept long-term access circuits as the only available option.

Finally, the FCC should clarify that the EEL use restriction should only apply to conversions and not to new combinations. In states that have previously ordered the ILECs to combine UNEs, the ILECs are imposing the FCC's local use restriction on any new EELs. The FCC should clarify that the protection it was affording the ILECs was related to the erosion of its existing special access revenue base and was not intended to preclude the unrestricted use of new UNE combinations in states that had ordered UNEs to be combined

In the event that the ILECs do not abide by the intention of the FCC's EEL rules, to ensure CLEC access to EELs while protecting the ILECs from immediate rate shock caused by IXC conversion of special access, the FCC should have no alternative but to lift the use restrictions.

2. If Nothing Else, Restrictions on Commingling Should be Eliminated

The Commission seeks comment in the *NPRM* on the commingling restrictions set forth in the safe harbor provisions of the *Supplemental Order Clarification*. There, the Commission “articulated two specific prohibitions on the co-mingling of services and network elements: (1) requesting carriers may not ‘connect’ loop-transport combinations to the incumbent LEC’s tariffed services; and (2) requesting carriers may not ‘combine’ loop network elements or loop-transport combinations with tariffed special access services.”³²⁰ Noting that some commenters have suggested that it should impose “a general prohibition on ‘connecting’ or ‘combining’ any network elements or combinations with access services,” the Commission seeks comment on assertions made by the ILECs in support of this suggestion and those made by CLECs opposing it.³²¹ The Commission also seeks comment on whether there are practical difficulties in co-mingling network elements with tariffed services and on methods to overcome such difficulties. In addition, the Commission asks whether there are “any other legal or policy reasons for permitting or prohibiting co-mingling restrictions.”³²²

As stated above, the ILEC’s duty to provide UNEs and their duty to provide wholesale services for resale are not mutually exclusive. Nothing in the Act gives ILECs the right to limit the means available under the Act by which CLECs can enter the local market. To the contrary, Congress intended to maximize the options for competitive carriers seeking to enter the local market. The co-mingling restrictions set forth in the safe harbor provisions of the *Supplemental*

³²⁰ *NPRM* at ¶ 70.

³²¹ *Id.* ILECs argue that their billing systems are not designed to treat a single circuit as part of a network element and part tariffed service, and that they have separate personnel to handle provisioning, repair, maintenance, billing, and other functions for network elements as opposed to tariffed access services that would make it difficult to manage circuits that co-mingled network elements and tariffed services. *Id.* In contrast, CLECs state that the current co-mingling restrictions force them to build and operate two duplicate, inefficient networks, thereby adding excessive cost and delay to their provision of competitive services. *Id.*

³²² *Id.*

Order Clarification should therefore be eliminated because they constitute an unreasonable limitation on resale of the ILEC's tariffed services and an unreasonable condition on the requesting carrier's access to UNEs.

The co-mingling restrictions set forth in the safe harbor provisions also should be eliminated because they have created a loophole through which ILECs have succeeded in denying CLECs access to the EEL. Specifically, the ILECs assert that the *Supplemental Order Clarification* prohibits requesting carriers from having a special access circuit and an EEL ride on the same DS-3 facility. As a result, the ILECs have forced requesting carriers seeking EEL conversions to move DS-1 circuits to an additional DS-3 circuit, to pay unjustifiable fees for the "forced moves," and to put the CLECs' customers unnecessarily at risk of service interruptions. This outrageous practice is calculated to render the CLECs' access to the EEL as difficult, costly, inefficient and risky as possible for its competitors.

Nothing in the *Supplemental Order Clarification* supports the assertion that the Commission had as its goal the segregation of UNE circuits from switched access circuits. To the contrary, the record plainly reflects that the Commission's purpose in establishing the restriction duplicated in each of the safe harbors was to prevent IXCs from converting special access circuits to unbundled loop and transport network elements at TELRIC pricing and thereby, bypass special access charges.³²³ The Commission's concern over special access charges, however, has since been resolved with the adoption of the CALLS proposal and its implementation of universal service reform. As such, there is simply no longer any need to

³²³ The local usage options present a reasonable compromise "under which it may be determined that a requesting carrier has taken affirmative steps to provide local exchange service to a particular end user *and is not seeking to use unbundled loop-transport combinations solely to bypass tariffed special access service.*" *Supplemental Order Clarification*, 15 FCC Rcd at 9598, ¶ 21 (emphasis added). The Commission subsequently added that "[w]e are not persuaded on this record that removing this prohibition would not lead to *the use of unbundled network elements by IXCs solely or primarily to bypass special access services.*" *Id.* at 9602, ¶ 28 (emphasis added).

maintain artificially high access revenues for the ILECs. The “co-mingling” prohibition in the safe harbor provisions should, therefore, be abolished.

In contrast, allowing the current co-mingling restrictions to stand would permit the ILECs to continue to make a mockery of the Commission’s expectation that the conversion of special access to EELs requires little more than a billing change and that upon receiving a conversion request that falls within one of the safe harbors, “the incumbent LEC should immediately process the conversion.”³²⁴ In addition, allowing the ILECs to continue to prohibit CLECs from having a special access circuit and an EEL ride on the same DS-3 facility forces requesting carriers to reconfigure their networks and to expend significant amounts of time, money and resources -- little of which could be justified in the real business world.³²⁵

This is no legal or policy basis for maintaining the co-mingling restrictions in the *Supplemental Order Clarification*. Allowing the co-mingling restrictions to stand not only forces competitors to build and operate two distinct overlapping networks, with increased costs and inefficiencies that ultimately must be passed along to consumers, and it affords the ILECs another opportunity to postpone compliance with the Act and the Rules and Orders of this Commission. The Commission should therefore abolish the co-mingling restrictions contained in the safe harbor provisions of the *Supplemental Order Clarification*.

³²⁴ *Id.* at 9603, ¶¶ 30-31.

³²⁵ As explained by certain commenters: “This inefficient network segregation would, in practical effect, require CLECs to construct twice the number of UNEs, lease twice the number of multiplexers, incur twice the amount of non-recurring and recurring charges for channel termination and configure twice the number of channel termination points, in effect forcing carriers to operate two distinct overlapping networks. . . . The ultimate result would be [the CLECs’ creation of] an entire duplicate “UNE-only” network that would exist parallel, but separate from a non-UNE network.” See Joint Comments of Cbeyond Communications, Inc., e-Spire Communications, Inc., KMC Telecom, Net2000 Communication Services, Inc., Winstar Communications, Inc. and XO Communications, Inc., at 14, in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed Apr. 5, 2001).

D. Verizon's "No Facilities" Policy Is Unlawful

In the *NPRM*, the Commission requested comment on whether ILECs may deny access to UNEs based on lack of facilities.³²⁶ In May 2001, Verizon adopted policies and practices under which it increasingly refuses to fill CLEC orders for high capacity loop and transport UNEs purportedly because "no facilities" are available. Commenters request that the Commission in this proceeding proscribe this practice and define the scope of ILEC unbundling obligations as described herein. Several Commenters have separately requested that the Commission establish a performance metric governing when ILECs may lawfully decline to provide UNEs based on lack of facilities.³²⁷

1. Verizon Rejects Upwards of 60% of CLEC UNE Orders for "No Facilities"

The frequency with which ILECs employ the "lack of facilities" ruse to evade their obligation to provide high capacity UNEs is difficult to ascertain because the ILECs control the relevant information and are loathe to provide this data to requesting CLECs. Nevertheless, recent non-proprietary data provided by Verizon in a proceeding before the Virginia State Corporation Commission indicates that incidence of CLEC UNE orders rejected for "no facilities" has increased dramatically to levels that severely undermine the ability of CLECs to compete in the market for high capacity services.

For example, Verizon's data shows that it did not reject a single DS-1 UNE loop order in Virginia for no equipment and/or "no facilities" available during the period of January 2001

³²⁶*NPRM* at 52.

³²⁷ Comments of Focal Communications Corp., Pac-West Telecomm, Inc., and US LEC Corp. in CC Docket No. 01-318, at 44-46 (Jan. 22, 2002).

through April 2001.³²⁸ However, around May 10, 2001, Verizon implemented new policies and practices, including training practices, relating to its treatment of CLEC orders for DS-1, DS-3, and OC-n loop and transport UNEs.³²⁹ As a result of Verizon's implementation of these policies and practices, Broadslate, Alltel, Cavalier and other CLECs experienced an immediate and significant increase in the percentage of DS-1 UNE orders rejected by Verizon in Virginia from approximately zero percent to a peak of approximately 60 percent in August 2001.³³⁰ Alltel, for example, reports that the percentage of DS-1 UNE orders rejected by Verizon has reached 54.8 percent of recent orders.³³¹ Other carriers including Focal, Adelphia Business Solutions, Inc., Madison River Communications, LLC, Mpower Communications Corp., and Network Plus, Inc. have also experienced a great increase in the instances in which Verizon refuses to provide broadband loops based on no facilities.³³² Most importantly, Verizon's own data confirms the experience of these CLECs. Specifically, Verizon's data demonstrates that the number of DS-1 UNE loop orders rejected for "no facilities" increased dramatically starting in May 2001 and

³²⁸Petition of Broadslate Networks of Virginia, Inc. for Declaratory Judgment Interpreting Interconnection Agreement with Verizon Virginia, Inc. (f/k/a Bell Atlantic – Virginia, Inc.) and Directing Verizon to Provision Unbundled Network Elements In Accordance with the Telecommunications Act of 1996, Case No. PUC010166, (Aug. 2, 2001) ("Virginia No Facilities Case No. 010166"), Verizon's Responses to Interrogatories and Requests for Production of Documents by the Staff of the State Corporation Commission (First Set), Response to Request No. 2, at Attachment One (hereinafter "Exhibit 1, Attachment One").

³²⁹Exhibit 2, OSP HICAP FLASH, at pages 1, 5-6.

³³⁰See, Exhibit 1, Attachment One.

³³¹*Petition of 360 Communications Company of Charlottesville d/b/a Alltel For Injunction Against Verizon Virginia, Inc. (f/k/a Bell Atlantic – Virginia, Inc.) for Violations of Interconnection Agreement*, Case No. PUC010176, at 3 (Aug. 16, 2001).

³³²Exhibit 3, Letter to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, dated September 28, 2001.

reached a peak in August 2001 when Verizon-Virginia rejected 63 DS-1 UNE loop orders out of a total of 105 orders for a rejection rate of 60%.³³³

In light of the dramatic increase in the rejection rate for UNE orders, it is evident that Verizon implemented new practices and procedures relating to DS-1, DS-3 loops and other UNEs in May 2001 that resulted in a dramatic increase in the rejection rate for UNE orders. In fact, the increased rejection rate is a direct result of “new and revised Process Standards” issued by Verizon to its Outside Plant Engineering Group on May 10, 2001, in an “OSP HICAP FLASH” message.³³⁴ This message provides that CLEC orders for high capacity loop and transport UNEs should henceforth be rejected by Verizon’s provisioning personnel for any of the following six reasons: No Repeater Shelf in the CO/Customer Location/RT, No Apparatus/Doubler Case, Need to place Fiber or Multiplexer, No Riser Cable or buried drop wire, and Copper cable defective no spares available – would need to place new cable (fiber/copper).³³⁵

In addition to the OSP HICAP FLASH message provided to its provisioning personnel, Verizon released a letter on July 24, 2001 (attached hereto as Exhibit 4) to CLECs purporting to address concerns expressed by a “number of carriers” that Verizon had changed its policies regarding Verizon’s provisioning of DS-1 and DS-3 UNEs. In its July 24, 2001 letter, Verizon maintains that it “will provide unbundled DS1 and DS3 facilities (loops or IOF) to requesting

³³³ Exhibit 1, Attachment One.

³³⁴ Exhibit 2, OSP HICAP FLASH, at 1, 5-6.

³³⁵ *Id.* at pages 5-6.

CLECs where existing facilities are currently *available*.”³³⁶ Verizon announces a new policy in its letter, however, stating that it has no legal obligation to augment, modify or reconfigure the DS-1/DS-3 electronics attached to available wire or fiber facilities to fill a CLEC order for an unbundled DS-1/DS-3 network element.³³⁷ Further, Verizon states in the letter, that it “will reject an order for an unbundled DS1/DS3 network element where (i) *it does not have the common equipment in the central office, at the end user’s location, or outside plant facility* needed to provide a DS1/DS3 network element, or (ii) there is no available wire or fiber facility between the central office and the end user.”³³⁸ Verizon has elaborated on this policy, stating that it will not deploy new multiplexers, reconfigure a multiplexer, or deploy a new apparatus case to fill a CLEC UNE order.³³⁹

Further, Verizon admits that beginning in “late Spring 2001, Verizon undertook efforts to re-educate its provisioning personnel . . . with respect to the provisioning of DS-1 and DS-3 UNE loops.”³⁴⁰ Verizon states that after its provisioning personnel “were properly educated” last spring, “those personnel began more consistently to follow” Verizon’s policy, which caused the increase in the number of DS-1 UNE service requests rejected for no facilities to rapidly increase from zero, during January through April 2001, to approximately 31% in June 2001, 47.5% in

³³⁶ Exhibit 4, Verizon Letter, “DS1 and DS3 Unbundled Network Elements Policy,” dated July 24, 2001, at 1 (“Exhibit 4, Verizon July 24, 2001 Letter”) (emphasis added).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Exhibit 7, Answer and Affirmative Defenses of Verizon Virginia, Inc. to Petition of Broadslate Networks of Virginia, Inc. For Declaratory Judgment, Case No. PUC010166, at 4 (“Verizon’s Answer”); Exhibit 2, OSP HICAP FLASH, at 1, 5-6.

³⁴⁰ Exhibit 6, VA SCC Case No. PUC010166, Verizon’s Responses to Staff’s Second Set, Response to Request No. 13.

July 2001, and a peak of 60% in August 2001.³⁴¹ While Verizon attempts to characterize its action as a mere “reiteration”³⁴² of its policy, its actions have resulted in a significant decline in the availability to CLECs of DS-1 and DS-3 UNEs that is properly viewed as a dramatic and unlawful shift in Verizon’s UNE provisioning and training policies.

Verizon policy toward CLEC UNE orders is clearly discriminatory because if high capacity facilities are needed to fill an order received by Verizon for special access, T-1 exchange access or other services and facilities at non-TELRIC prices, then, generally, Verizon will modify, reconfigure or augment the electronics to provide the facility. In fact, Verizon states that to fill such orders it “generally will undertake to construct the facilities required to provide service at tariffed rates (including any special construction rates).”³⁴³ Further, Verizon will modify, reconfigure or augment the electronics to provide the facility if the CLEC orders the service at much higher prices through the special access tariffs or other Verizon tariffs.³⁴⁴ Additionally, Verizon admits that with respect to facilities ordered pursuant to Verizon’s retail tariffs in Virginia:

Verizon VA does not reject orders for Flexpath T-1 exchange access lines/trunks/transport facilities [and/or T-1 Special Access facilities] due to a lack of facilities. If Verizon determines that there are no facilities available for these orders, they will build the facilities and complete the order.³⁴⁵

³⁴¹ *Id.*

³⁴² Exhibit 7, Verizon’s Answer, at 3; Exhibit 6, Verizon’s Responses to Staff’s Second Set, Response to Request No. 13.

³⁴³ Exhibit 7, Verizon Answer, at ¶ 21.

³⁴⁴ *Id.*

³⁴⁵ Exhibit 5 (Redacted), Verizon Virginia, Inc. Responses to Broadslate Networks of Virginia, Inc. First Set of Interrogatories, Response to No. 16, subparts a and b.

2. Verizon's "No Facilities" Position Is Based Upon An Erroneous Reading of the Eighth Circuit's Decision Regarding the Commission's Superior Network Rules

In support of their position on "no facilities," Verizon and other ILECs argue that requiring ILECs to augment, modify, or rearrange electronics to fill UNE orders is inconsistent with the decision of the United States Court of Appeals for the Eighth Circuit that "CLECs may not force an ILEC to construct a superior quality network on their behalf."³⁴⁶ Verizon misconstrues the Eighth Circuit's holding. In the decision relied upon by the ILECs, the Eighth Circuit struck down Commission superior quality rules 51.305(a)(4) and 51.311(c)³⁴⁷ that required ILECs upon request to provide UNEs and access to UNEs that is "superior in quality to" that which the ILEC provides to itself.³⁴⁸ The ILECs, however, conveniently ignore that the Eighth Circuit specifically held:

Although we strike down the Commission's rules requiring [ILECs] to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) *include modifications to [ILEC] facilities* to the extent necessary to accommodate interconnection or access to network elements."³⁴⁹

In short, requiring ILECs to perform minor modifications to their existing networks to fill CLEC UNE orders (such as adding line cards, multiplexers, and other electronics) is entirely consistent with the Eighth Circuit's holding that "Section 251(c)(3) implicitly requires unbundled access

³⁴⁶ Exhibit 7, Verizon's Answer, at 5.

³⁴⁷ 47 C.F.R. § 51.311(c) and 51.305(a)(4) (1998).

³⁴⁸ *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 812-813 (8th Cir. 1997), *appealed on other grounds*, 119 S.Ct. 721 (1999).

³⁴⁹ *Id.* at 813 (emphasis added).

only to an [ILEC's] existing network – not a yet unbuilt superior one.”³⁵⁰ CLECs are not requesting a “superior network” by requesting that the ILEC augment, modify, or rearrange attached electronics. Rather, CLECs are requesting that Verizon provide unbundled access to the same network that ILECs provide to their own special access, DS-1, DS3, OCN and other customers. CLECs request that Verizon undertake only the placement, augmentation, modification and replacement of facilities that is routine in the existing network, not that Verizon build a new, superior network.

Moreover, “network” as used by the Supreme Court means the type of technology and facilities that the ILEC actually currently deploys and when and how it ordinarily deploys them in the aggregate. Thus, the existing network includes the types of electronics that ILECs ordinarily attach to loops, even if not attached to particular loops, and it does not constitute provision of a new network to attach routine electronics to a loop. Therefore, whatever application the Eighth Circuit’s no “superior network” limitation may have, it does not justify Verizon’s specific policy of declining to provide as loop UNEs what it provides to its own customers as part of its existing network.

3. Verizon Has Not Established a Lawful Basis for Its “No Facilities” Policy Under Commission Orders

In the few instances where an ILEC has attempted to articulate a lawful basis for its “no facilities” policy, it has grossly mischaracterized and otherwise misapplied the *Local Competition Order*, and the *UNE Remand Order*.³⁵¹ For example, Verizon contends that the Commission’s rules requiring line conditioning do not require it to install electronics and other

³⁵⁰ *Id.*

equipment necessary to provide DS-1 and DS-3 loop UNEs because line conditioning involves removal of equipment, whereas CLECs are requesting that Verizon add equipment, including electronics. Regardless, of whether the current line conditioning rules invalidate Verizon's "no facilities" policy, which they do, there is absolutely no meaningful legal distinction under Section 251(c)(3) between ILECs removing or adding equipment. Significantly, there is no language in the Act that would so dramatically alter ILEC obligations to provide UNEs depending on whether the ILEC is adding or removing equipment. The point is that ILECs must affirmatively take the steps necessary to provide for CLECs as UNEs the same functionality that they use for their own special access, exchange access, DS-1 and other customers whether these affirmative steps involve additions to, or removal of equipment from, the loop. In fact, the Commission underscored in the *Local Competition Order* that Verizon was required to provide requesting CLECs with unbundled DS-1 capable loops, including attached electronics.

Specifically, the Commission concluded:

The local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are *conditioned* to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and *DS-1-level signals*.³⁵²

In its *Local Competition Order*, the Commission then addressed the requirement for incumbent LECs, such as Verizon to take affirmative steps to condition existing loop facilities to carry such digital signals:

³⁵¹ *UNE Remand Order*, at ¶ 167.

Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. For example, if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. Thus, we reject Bell South's position that requesting carriers "take the LEC networks as they find them" with respect to unbundled network elements. As discussed above, *some modification of the incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3).*³⁵³

The Commission confirmed the ILEC's obligation to condition facilities, including attaching the needed electronics, once again in the *UNE Remand Order*:

In order to secure access to the loop's full functions and capabilities, we require the incumbent LECs to condition loops. This broad approach accords with section 3(29) of the Act, which defines network elements to include their "features, functions, and capabilities."³⁵⁴

Thus, Verizon's obligations under Section 251(c)(3) are not defined by whether Verizon technicians remove equipment from, or add it to, the loop. Further, the loop conditioning rules represent a recognition by the Commission that ILECs have an affirmative obligation to take steps to provide as network elements the same functionality that they provide to their own retail subscribers.

³⁵² *Local Competition Order*, at ¶ 380 (emphasis added).

³⁵³ *Id.* at at ¶ 382.

³⁵⁴ *UNE Remand Order*, at ¶ 167.

4. The Commission May Require ILECs to Modify And Attach Electronics
UNEs

For the reasons explained above, Verizon has not provided any lawful basis for its cramped view of its unbundling obligations. More than that, however, the Commission may, pursuant to Section 251(c)(3) require ILECs to attach electronics and take other affirmative steps, such as reconfiguration and installation of multiplexers and equipment cases, in order to provide DS-1 and DS-3 loops and other UNEs. Section 251(c)(3) requires that ILECs provide UNEs on “conditions that are just and reasonable.” In the recent *Collocation Remand Order*, the Commission found that the comparable provision in Section 251(c)(6) provided the Commission substantial authority to impose conditions on ILECs provision of collocation, including provision of cross-connection between collocated CLECs even though this was not directly “necessary” for interconnection or access to UNEs.³⁵⁵ Similarly, the Commission may require ILECs to perform routine enhancements to loops, such as attachment of electronics, as a reasonable condition of provision of loops and other UNEs. Indeed, the requirement under Section 251(c)(3) that ILECs provide UNEs on reasonable terms and conditions provides a deep font of authority for the Commission to assure that ILECs do not unreasonably restrict the availability of UNEs in ways that effectively prevent CLECs from providing competitive services.

Section 251(c)(3) also requires that ILECs provide UNEs on nondiscriminatory terms and conditions. Simply stated, it constitutes a fundamental discrimination against CLECs for ILECs to routinely provide network capabilities to their own special access, exchange access, DS-1, DS-3 and other customers while refusing to do so for CLECs as UNEs. Moreover, as explained

³⁵⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435 (2001) ¶¶ 80-84, (“*Collocation Remand Order*”).

below, this significantly harms CLECs, as well as thwarting the pro-competitive goals of the Act. CLECs will not be able to effectively compete in the local marketplace if they are not able to provide service to customers on comparable terms as the ILEC because the ILEC will not provide as UNEs the same functionality that it provides to its own retail customers. Accordingly, the Commission may under Section 251(c)(3) require ILECs to provide enhancements to loops that they provide to their own special access, exchange access, T-1, DS-n and other customers in order to assure non-discriminatory provision of UNEs. Commenters request that the Commission do so in this proceeding.

E. Section 271 Checklist Items are Independent Requirements

The Commission seeks comment on the relationship between the competitive checklist for applications for BOC authority to provide interLATA services set forth in section 271(c)(2)(B), and the statutory unbundled access standards and obligations set forth in sections 251(d)(2) and 251(c)(3). Specifically, the Commission seeks comment as to whether it should, with respect to the potential limitation or removal of unbundling obligations that overlap the requirements of section 271(c)(2)(B), treat those network elements differently from other elements and, if so, how.

As discussed in more detail herein, the Commission should not at this time remove or limit any of the unbundling obligations previously established in this docket. However, looking forward with respect to future UNE review proceedings, the Commission should establish a heightened standard to remove or limit any network element from the national UNE list that also

is specifically identified in the section 271 checklist.³⁵⁶ The FCC previously has ruled that, in light of the “at a minimum” language” set forth in section 251(d)(2) and the overarching pro-competitive goals of the Act, the FCC may require greater unbundling than what is necessary to preclude impairment.³⁵⁷ The FCC should apply this reasoning to create a heightened test that must be met before limiting or eliminating from the national list those UNEs that also are specifically identified by Congress in the section 271 checklist.

However, to the extent that in future proceedings the record establishes that any of the previously established unbundling obligations should be limited or removed, this should not in any way diminish the Commission’s review of the corresponding checklist items set forth in section 271(c)(2)(B) in section 271 proceedings. That is, the checklist items set forth in section 271(c)(2)(B) are independent requirements that must be satisfied before a BOC may be granted authority to provide interLATA services, regardless of whether the Commission has determined to limit or remove some of those network elements from the national UNE list. As the Commission has previously recognized, providing access and interconnection to elements on the checklist remains an obligation for BOCs seeking long distance approval, regardless whether these elements are unbundled.³⁵⁸

³⁵⁶ In establishing the competition checklist in section 251(d)(2), Congress specified that, at a minimum, a BOC applying for long distance authority must show, among other things, that it provides “nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1),”³⁵⁶ and that it is providing to requesting carriers the following network elements: local loops, transport, switching, databases and signaling. 47 U.S.C. § 271(c)(2)(B). A heightened review test should apply before any of the network elements specifically identified in § 271(c)(2)(B) are limited or removed from the national UNE list.

³⁵⁷ *UNE Remand Order* at 3713-3714, ¶¶ 26 and 27.

³⁵⁸ *UNE Remand Order* at 3905, ¶ 468.

Because the corresponding section 271 obligation will remain in effect even if a UNE is removed from the national list in the future, and in light of the critical importance of ensuring BOC compliance with the section 271 checklist, the Commission should maintain and apply its section 251 rules for the corresponding UNEs specifically identified on the section 271 checklist. That is, in order to implement and measure ILEC compliance with Section 271, the Commission should continue to apply the section 251 requirements for UNEs specified in section 271(c)(2)(B) for purposes of section 271 review, even if it determines in future review proceedings to limit or remove such UNEs from the national list.

F. The Commission's Examination of Sections 201 and 202 to Encourage Broadband Deployment in the Absence of Unbundling, and of "Commercially Reasonable Rates," Is Premature

As stated herein, Commenters believe that, based on the application of the statutory standards set forth in section 251(d)(2), there is no justification to curtail or eliminate unbundled access to ILEC broadband network elements. Accordingly, any discussion of regulations regarding "commercially reasonable rates" for broadband facilities in the absence of Section 251(c)(3) unbundling obligations is unnecessary.

Commenters stress, however, that TELRIC pricing principles permit ILECs to recover the cost of new investment in broadband. While TELRIC appropriately prevents ILECs from recovering their historic costs of outmoded and inefficient plant and equipment, TELRIC models and pricing principles permit forward-looking investment to be recovered, including a profit.³⁵⁹

³⁵⁹ See, e.g. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, ¶ 150 (1999); see also *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, Interlata Services in Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, ¶ 290 (1997).

In effect, with respect to new broadband investment, TELRIC is a “commercially reasonable” rate under any reasonable definition.

Therefore, there is absolutely no merit to ILEC contentions that TELRIC inhibits their investment in broadband. Statements by BOC regulatory spokespersons that, if they invest \$1,000 in broadband they are permitted to only recover \$600, are false and no more than another attempt to manipulate policy makers.³⁶⁰

Moreover, as noted elsewhere in these comments, the existing network already has a significant broadband capability, and has had this capability for many years. In moving forward with application of TELRIC pricing to unbundled access to a more advanced broadband network, the Commission should assure that CLECs obtaining existing network elements, and consumers of ILEC services, are not required to pay for network upgrades they do not need and have not requested. This is particularly important given the very high cost of building advanced networks and that there is insufficient demand for them.

G. Variations in Network Elements Should Not be Considered “Superior” Under Invalidated Section 51.311(c) of the Rules

The Commission seeks comment regarding whether any specific quality or variation of a network element provided by an ILEC to itself, its customers, or other carriers should be considered “superior” under invalidated section 51.311(c) of the Rules. Under invalidated section 51.311(c) of the rules, ILECs were required to provide, if so requested by an interconnecting carrier, and to the extent technically feasible, unbundled network elements and access to such unbundled network elements that are superior in quality to that which the ILEC

³⁶⁰ See 2002 WL 3187251, transcript of National Public Radio interview with Verizon Vice President Tom Tauke (Feb. 27, 2002).

provides to itself. In its decision in *Iowa Utils. Bd. V. FCC*, the United States Court of Appeals for the Eighth Circuit invalidated section 51.311(c) of the rules because it did not believe that subsection 251(c)(3) of the Act mandates that ILECs must provide superior quality access to network elements to requesting carriers.³⁶¹ The Court disagreed with the FCC's argument that the terms "at least equal in quality" in section 251(c)(3) of the Act support the FCC's rule requiring ILECs to provide superior quality access to network elements.

However, the FCC's rule and the Court's discussion in invalidating the rule were limited to a discussion of whether ILECs must, at the request of a carrier, provide interconnection, network elements, and access to network elements that are superior in quality to the level of quality that the ILEC provides to itself. The discussion of "superior quality" in these contexts (both the FCC and the Court) did not address a situation in which the ILECs are providing a particular level of quality of interconnection, network elements and/or access to network elements to themselves or to others. Instead, the rule anticipated a situation in which the ILEC does not provide a particular level of quality, and would have required the ILECs to provide a level of quality superior to what the ILEC provided itself if a requesting carrier desired a superior level of quality.

Commenters submit that if an ILEC provides a particular quality of access or variation of network elements to itself or any other entity, the quality of access to or variation of network elements inherently is not "superior," and cannot be considered to be "superior."

³⁶¹ *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997).

Moreover, to the extent a network element encompasses the functionality, features and capabilities of an existing or prior service offering or other arrangement of an ILEC, then the quality of, or access to, such a network element cannot be considered “superior.”³⁶²

The Commission also seeks comment on “whether the quality of a network element could be found to be something other than ‘superior’ if it allows the provision of services that could not be provisioned using network elements of another quality.”³⁶³ Again, if an ILEC provides access to a network element to itself, its customers, or any other entity, regardless of whether those services could (or could not) be provisioned using some other network element of a different level of quality, access to such a network element is not “superior” to what the ILEC provides itself.

In sum, ILECs are required under the Act to provide access to the full functionality, features and capabilities of UNEs.³⁶⁴ If the ILECs provide access to UNEs to themselves, other carriers, or to customers, then access to such UNEs cannot be considered “superior,” and the ILECs must provide the full functionality, features and capabilities of the UNEs to requesting carrier, to the extent technically feasible, regardless whether the ILECs themselves currently are utilizing the full functionality, features, and capabilities of such UNEs.

³⁶² The term “network elements” is defined under section 3(29) of the Act as “a facility or equipment used in the provision of telecommunications services” including “features, functions, and capabilities, that are provided by means of such facility or equipment.” 47 U.S.C. § 153(29). In prior proceedings, the Commission has recognized that requesting carriers are entitled to full access to all of the “features, functions, and capabilities” provided by the ILEC’s facility or equipment. For example, in requiring line sharing, the Commission determined that the “frequencies above those used for analog voice services on any loop are a capability of that loop.” *Line Sharing Order*, FCC 99-355 ¶ 17.

³⁶³ *NPRM* at ¶ 74.

³⁶⁴ The term “network element” is defined under section 3(29) of the Act to include the “features, functions, and capabilities that are provided by means of [the UNEs].” 47 U.S.C. § 153(29). See also *Line Sharing Recon. Order*, 16 FCC Rcd 2101, ¶ 18.

VII. IMPLEMENTATION ISSUES

A. The Commission Should Continue a Fixed Term Review Process

Commenters believe that a fixed term review process will provide the best means to determine whether, in light of changed market or technical conditions, based on a record gathered from industry comments, UNEs should be added to, or removed from, the national list. Such a fixed term review process would permit the Commission to update the list under the appropriate statutory standards. A fixed term review process also would promote regulatory certainty by providing parties with an opportunity to refresh the record on a fixed term basis.

B. Any Party Seeking to Limit or Remove a UNE from the National List Has Burden of Proof; Petitions for Review Should Be Barred Between Fixed Term Review Periods

Commenters agree with CompTel's Petition filed on November 26, 2001 that³⁶⁵ that any party seeking to limit or remove a UNE must bear the burden of proof to show, by a preponderance of evidence on the record, that the requested relief is justified.³⁶⁶

Commenters also urge the Commission to bar the filing of petitions to remove unbundling obligations between fixed period review cycles, while permitting parties to file petitions to add UNES to the mandatory list at any time.³⁶⁷ As the Commission has recognized, entertaining incumbent LEC petitions to remove UNEs from the list on an *ad hoc* basis "would threaten the certainty that we believe is necessary to bring rapid competition to the greatest

³⁶⁵ Petition of the Competitive Telecommunications Association ("CompTel") in CC Docket No. 96-98 (filed Nov. 26, 2001).

³⁶⁶ *Id.* at 13.

³⁶⁷ *Id.* at p. 10.

number of consumers” and “would undermine the goal of implementing unbundling rules that are administratively practical to apply.”³⁶⁸

C. Sunset Periods are Premature

The Commission should not establish preset automatic mechanisms or triggers for removing UNEs. The establishment of such sunset periods would entail a substantial risk of harming competition by premature removal of UNEs. The Commission cannot now foresee all the circumstances that may warrant continuation of a network element as a UNE.

The Commission also should not establish specific sunset dates for any listed UNEs. As the Commission acknowledged in the *UNE Remand Order*,³⁶⁹ and as discussed by numerous commenters in that proceeding,³⁷⁰ the Commission cannot predict with certainty when an unbundling standard set forth in section 251(d)(2) will no longer be met for particular network elements. Moreover, sunset dates would undercut incumbent LEC incentives to comply with unbundling obligations, especially as the sunset date approaches.

D. The Next Substantive UNE Review Should be in 2005

The Commission seeks comment on whether the next UNE review period could take place in 2005, or whether Section 11 of the Act requires a UNE review in 2004. Section 11 of the Act requires the Commission to review in even-numbered years (beginning with 1998) whether regulations in effect “that apply to the operations or activities of any provider of

³⁶⁸ *Id.* at ¶ 150.

³⁶⁹ *UNE Remand Order* at 2766, ¶ 152.

³⁷⁰ See CC Docket No. 96-98, Comments of Illinois Commission at 15-16 (May 26, 1999); Joint Comments of Choice One at 27 (May 26, 1999); Comments of Level 3 at 24 (May 26, 1999); Comments of MCI WorldCom at 12 (May 26, 1999); Comments of OpTel at 14 (May 26, 1999); Comments of RCN at 26-27 (May 26, 1999); Comments of Sprint at 42-43 (May 26, 1999); Comments of KMC at 33-34 (May 26, 1999); Reply Comments of

telecommunications service” are no longer necessary in the public interest “as the result of meaningful economic competition between providers of such service.”³⁷¹

Commenters submit that the establishment of a three-year fixed UNE review cycle is not inconsistent with Section 11. The nature of the biennial review contemplated by Section 11 of the Act, which entails a generalized inquiry regarding the state of economic competition between providers of telecommunications service, is different than a UNE review under the standards of Section 251(c)(3). Thus, a determination pursuant to Section 11 that economic competition exists between local providers would be a meaningless undertaking for purposes of UNE unbundling review, since such competition could be based in part upon CLECs providing telecommunications services through the purchase of UNEs from ILECs. Therefore, a finding of “economic competition” under Section 11 could not support the removal or limitation of unbundled UNEs, since such competition would be attributable at least in part to the CLECs’ ability to continue to purchase UNEs from the ILECs. For purposes of the next biennial review, the Commission should conclude that, for now and the foreseeable future, any level of existing local competition exists *because* of UNE-based competition, which is not a sufficient showing under Section 11 to determine that unbundling is no longer in the public interest.

In contrast, the three-year substantive review of UNEs established by the Commission in the *UNE Remand Order* would involve analysis of the statutory “necessary” and “impair” standards based on record evidence. Based on experience to date with efforts to implement the mandates of the Telecommunications Act (and ILEC efforts to thwart implementation of the

Sprint at 12 (June 10, 1999). *See also* Comments of CoreComm at 40 (May 26, 1999); Reply Comments of California PUC at 14 (June 10, 1999); Reply Comments of Pilgrim at 13 (June 10, 1999).

Act), a three-year review period would provide a more reasonable interval in which to assess whether any UNEs may be limited or removed from the national list based on application of the statutory “necessary” and “impair” standards.

The Commission stated in the *UNE Remand Order* that “[w]e expect to reexamine our national list of network elements that are subject to the unbundling obligations of the Act every three years.”³⁷² The Commission found that a three-year time frame for reevaluating the unbundling obligations is warranted to provide competitors with reasonable certainty for a period of time that is sufficient time to implement their plans.³⁷³ Commenters submit that a three-year time frame balances incumbent LEC concerns with the critical need to “provide a measure of certainty to ensure that new entrants and fledgling competitors can design networks, attract investment capital, and have sufficient time to attempt to implement their business plans.”³⁷⁴ Thus, the Commission should establish that the next substantive review under Section 251(c)(3) should take place in 2005. As stated herein, the Commission should also continue to bar the filing of petitions to remove UNEs between cycles.³⁷⁵

E. The Commission Should Consider the Financial Impact on CLECs of any Changes in UNE Rules

Consistent with the procompetitive goals of the 1996 Act, the Commission should address the financial impact on CLECs of any changes to UNE availability. CLECs have invested billions of dollars in telecommunications infrastructure, in reliance on the 1996 Act and

³⁷¹ 47 U.S.C. § 161

³⁷² *UNE Remand Order* at ¶ 151.

³⁷³ *Id.*

³⁷⁴ *Id.* at ¶ 150.

the Commission's implementing rules, and in particular the *UNE Remand Order*, in order to bring the benefits of local competition to American consumers and businesses. The statutory UNE regime -- and Commission enforcement of the regime -- is vital to virtually all CLECs, and the ILECs' persistent intransigence and refusal to implement statutory UNE requirements and the Commission's implementing rules has thwarted the development of local competition at every turn. Changes to UNE availability could drastically affect the business plans and network configurations of CLECs, which in turn could effectively put an end to local competition before it had an opportunity to develop. It is therefore critical to the underpinnings and goals of the Telecommunications Act of 1996 that the Commission not make any changes to UNE availability without first assessing the financial impact on CLECs. That assessment would mandate a permanent grandfathering of UNEs currently received by CLECs.

F. The Commission Should Establish An Opportunity for a "Fresh Look"

For numerous reasons including the ILECs' delayed offering of the EEL product, provisioning delays for high-capacity UNE loops and transport, and arduous EEL conversion processes, many CLECs have been forced to purchase special access facilities to provide local exchange service to their customers. For instance, Focal experienced significant difficulty with both Verizon and SBC in attempting to convert special access circuits.³⁷⁶ Given the fact that special access rates remain substantially above cost, these circuits were only affordable to CLECs if they ordered the special access circuits at a discount for term commitments ranging from five to seven years. In addition, the uncertainty surrounding the EEL conversion process,

³⁷⁵ *Id.*

³⁷⁶ Comments of Focal Communications Corporation in CC Docket No. 96-98, at 12 (April 5, 2001).

and the need to provide prompt service to its customers, left CLECs with no other choice but to order special access circuits with term discounts.³⁷⁷ While CLECs would undoubtedly like to convert these circuits, the large termination penalties that ILECs threaten to impose are a significant constraint on such conversions.

To promote competition and to allow CLECs to finally take advantage of the EEL product, the Commission should allow carriers that are in these term-discounted arrangements to take a “fresh look” to determine if they wish to convert those circuits to EELs without incurring the huge termination penalties. The Commission has previously determined that a fresh look policy benefits competition when “certain long-term special access arrangements may prevent customers from obtaining the benefits of the new, more competitive access requirements.”³⁷⁸ In these instances, the Commission may limit the amount of termination penalties an ILEC customer must pay for ending their particular special access service.³⁷⁹

The Commission should permit CLECs to convert to EELs without paying any special access termination penalties. There is no termination that is actually involved here as the conversion should not require the disconnection of the circuit, but merely modification of billing information.³⁸⁰ In an EEL conversion, the CLEC is not changing providers, but is merely switching to a different service offered by the ILEC. The CLEC will continue to pay the ILEC

³⁷⁷*Id.*

³⁷⁸ *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order at ¶ 197 (1995).

³⁷⁹ *Id.*

³⁸⁰ *Supplemental Order Clarification* at ¶ 30.

for the same circuit, and under TELRIC, the ILEC will continue to recover the forward-looking cost of the circuit.

The higher recurring and nonrecurring charges that ILECs would have obtained from the CLEC purchase of special access facilities already provides a windfall to the ILECs. The attachment of termination liability will only add to this windfall, and the Commission should not allow the imposition of such termination penalties. At the very least, CLECs should be allowed to obtain a “fresh look” for the term plans they entered into in the past two years due to the ILECs’ failure to comply with the Commission’s EEL conversion requirements.³⁸¹

VIII. THE COMMISSION SHOULD MAINTAIN THE CURRENT ROLE OF THE STATES

A. The Commission Should Establish A Minimum List of UNEs that States May Supplement

The Commenters urge the Commission to maintain the current vital role of states in determining unbundled network elements. The FCC in the *UNE Remand Order* established a national baseline for unbundled network elements (“UNEs”) to which states could impose additional obligations as long as they further the goals of the Act.³⁸² As the Commission noted:

[i]n the *Local Competition First Report and Order*, the Commission concluded that identifying a specific list of network elements that must be unbundled, applicable in all states and territories, would best further the ‘national policy framework’ Congress established to promote competition in local markets. In particular, the Commission found that a national list would: (1) allow requesting carriers, including small entities, to take advantage of economies of scale; (2) provide financial markets with greater certainty in assessing requesting carrier’s business plans; (3) facilitate the state’s ability to conduct arbitrations; and (4)

³⁸¹ Comments of Focal Communications Corporation in CC Docket No. 96-98, at 14 (April 5, 2001).

³⁸² *UNE Remand Order* at ¶ 153.

reduce the likelihood of litigation regarding the requirements of Section 251(c)(3).³⁸³

These same factors require the continuation of the national list of UNEs. The Commission also noted that a national list would promote facilities-based competition by allowing CLECs to develop a sufficient customer base to serve as a foundation for facility deployment.³⁸⁴ The past three years have borne this out as CLECs following “smart build” strategies have been deploying facilities as warranted, and using a combination of UNEs and facilities investment to expand their networks. This is still an emerging and nascent process, however, and should be allowed to continue on course. The Commission also noted that a national list creates regulatory certainty.³⁸⁵ Now more than ever CLECs need to know that there is a national baseline list of elements that they can be sure of such that they can continue developing their business plans. After six years of litigating to establish UNEs, CLECs need to be able to start utilizing them to their full potential. A national list also is administratively easier and will ultimately reduce regulation.³⁸⁶

As the Commission noted, nearly all the state commissions commenting in the *UNE Remand* proceeding endorsed the adoption of a national list for UNEs.³⁸⁷ A national list of UNEs will continue to ease the state commissions’ role in evaluating and resolving disputes in this

³⁸³ *Id.* at ¶ 117.

³⁸⁴ *Id.* at ¶ 234.

³⁸⁵ *Id.* at ¶ 140.

³⁸⁶ *Id.* at ¶ 142-143.

³⁸⁷ *Id.* at ¶ 119.

area.³⁸⁸ It will provide a baseline from which states can build a stronger foundation for local competition in their markets. The implementation of national standards will continue to provide greater clarity and guidance to a state in its effort to make local competition a reality in its state, and would build upon the good work the states have already done in their UNE proceedings.

The process the Commission established in the *UNE Remand Order* has worked well. The national list of UNEs has provided a good baseline and a clear framework for states to utilize. A state can examine the situation in its markets and determine if competition is taking root, or if more needs to be done to establish competition. In setting a solid national baseline in the *UNE Remand Order*, states were able to focus their efforts on more cutting edge issues. For instance, the Illinois Commerce Commission recently created the broadband loop with packet switching functionality as a new UNE.³⁸⁹ Staff of the Florida Public Service Commission has recommended that a similar broadband UNE be established in an arbitrated interconnection agreement.³⁹⁰ These state commissions examined the particular circumstances in their state and

³⁸⁸ For instance, the Illinois, California and Connecticut public utility commissions all argued that a national list of UNEs would allow competition to proceed quickly because it will reduce the number of issues states must address in upcoming arbitrations. *Id.* at ¶ 128. Many of these arbitrations have been conducted, but drastically changing the role of the states would undermine the finality in any of those arbitrations. For instance, if the role of the states is curtailed, ILECs may seek to undo many pro-competitive additions that a state may have made to the list of UNEs.

³⁸⁹ See Arbitration Decision on Rehearing, *In the Matter of Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, et al.*, Illinois Commerce Commission, Docket Nos. 00-0312 and 00-0313 (Illinois Commerce Commission, Feb. 15, 2001) (“*Illinois Pronto Arbitration Order*”); see also Proposed Order on Rehearing, *In the Matter of Illinois Bell Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Services*, Illinois Commerce Commission, Docket No. 00-0393, (August 10, 2001) (“*Illinois Rehearing Order*”);

³⁹⁰ *Florida Public Service Commission Docket No. 010098-TP - Petition By Florida Digital Network, Inc. For Arbitration Of Certain Terms And Conditions Of Proposed Interconnection And Resale Agreement With Bellsouth Telecommunications, Inc. Under The Telecommunications Act Of 1996*, Revised Staff Recommendation at 5 (Feb. 21, 2002).

determined that something more than the national baseline was warranted. In taking this action, the states are also building a record upon which the Commission can examine the propriety of future UNEs.

The Commission, however, should not allow states to remove elements from the list as this will undercut the benefits that a baseline will provide including the goals of facilities-based competition, regulatory certainty and administrative practicality described above. In particular such an action would frustrate existing business plans as CLECs would lack much-needed certainty and would have to incur tremendous costs in relitigating these issues throughout the United States. The Commission should not alter the states' role in being able to add to, but not subtract from, a national list of UNEs.

B. The Commission Should Not Establish a Federal/State Joint Conference

There is no need for a Federal/State Joint Conference on UNEs as suggested in the *NPRM*.³⁹¹ Such a conference would be superfluous at best, and would further delay resolution of these issues raised in this proceeding. After the Commission addressed lingering definitional concerns raised by the U.S. Supreme Court, the Commission, in concert with the states, have forged pro-competitive unbundling rules. This was accomplished without a Federal/State Conference. Federal/State Joint Conferences work well in the case of overlapping jurisdictions where the roles of the regulatory bodies are amorphous, and the definitional lines are blurred. In the context of UNEs, it is beyond dispute that the Commission has authority to establish a baseline set of UNEs, which the states can build upon. There is no need for a Joint Conference to do what the Commissions and the states have already effectively done through the carrying out of

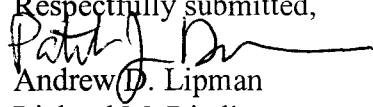
³⁹¹ *NPRM* at ¶ 76.

their independent roles. A Joint Conference is not needed to protect, or enhance, state participation in this process as states will most certainly provide vital input in this proceeding, and states will be implementing these rules, and determining if additional rules need to be created. Accordingly, the Commission should not establish a Federal-State Joint Conference.

IX. CONCLUSION

Commenters request that the Commission conclude this proceeding, in accordance with the recommendations herein, at the earliest possible date.

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